(25,033)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY AND THE CLEVELAND TRUST COMPANY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF OHIO ON THE RELATION OF HUBERT C. PONTIUS, PROSECUTING ATTORNEY OF STARK COUNY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1916.

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1 *Return of Writ.*

In the Supreme Court of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within Writ, I hereunto transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within case, together with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at my office in Columbus, Ohio, this 6th day of November, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

2 *Petition for Writ of Error.*

In the Supreme Court of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

To the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of Ohio:

Now come The Northern Ohio Traction & Light Company and The Cleveland Trust Company, both corporations duly organized and existing under and by virtue of the laws of the State of Ohio, defendants in the above case, and would show unto this Honorable Court that in the record and proceedings and rendition of the decree in the above case by the Supreme Court of the State of Ohio,

it being the highest court of said State in which a decision could be had in said suit, manifest error has occurred greatly to the damage of these defendants, whereby these petitioners feel themselves aggrieved.

That as appears in the record and proceedings, there was drawn in question in said case the validity of a resolution passed by the Board of County Commissioners of Stark County, Ohio, on February 19th, 1913, declaring forfeited and terminated the franchise and right of said The Northern Ohio Traction & Light Company to maintain and operate its interurban railroad upon the highway between the cities of Canton and Massillon in said Stark County, Ohio, and the validity of the authority so exercised by said Board of County Commissioners under the State of Ohio, on the
3 ground of repugnancy to the Constitution of the United States, in that the same was an impairment of the obligation of these petitioners' contract, and the taking of their property without due process of law, and denial to these petitioners of the equal protection of the law, and the decision of said Court was in favor of the validity of said resolution and of the authority exercised by said Board of County Commissioners under the State of Ohio; all of which is fully apparent in the record and proceedings of the case, and is specifically set forth in the assignment of errors filed herewith. These petitioners say that said Federal question was necessarily involved in this case and that a decision of said Federal question was necessary to the judgment rendered herein.

Wherefore, these petitioners present herewith an exemplified copy of the record of the Supreme Court of Ohio in said case, and pray that a Writ of Error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, that said bond and Writ of Error may operate as a supersedeas and that a transcript of the records, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such case made and provided, that the errors complained of may be reviewed in said Court, and the judgment aforesaid of said Supreme Court of Ohio be reversed.

JOHN C. WELTY,
KLINE, CLEVENGER, BUSS & HOLLIDAY,
Attorneys for the Northern Ohio Traction & Light Co.
R. T. SAWYER AND
G. M. CUMMINGS,
Solicitors for Defendants.

The Writ of Error as prayed for in the foregoing petition is hereby allowed, this — day of October, 1915.

The Writ of Error to operate as a supersedeas upon defendants giving a bond conditioned according to law, in the sum of $10,000.00.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

Filed in my office this 9th day of November, 1915.

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

4 [Endorsed:] No. 14114. In the Supreme Court of Ohio. The State of Ohio on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company and The Cleveland Trust Company, Defendants. Petition for Writ of Error. John C. Welty, and Kline, Clevenger, Buss & Holliday, Attorneys for The Northern Ohio Traction & Light Company. Filed Nov. 9, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

5

Assignment of Errors.

In the Supreme Court of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,

vs.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

Now come the defendants herein, The Northern Ohio Traction & Light Company and The Cleveland Trust Company, by their solicitors, and say that the decree entered in this case is erroneous and unjust to said defendants in the following particulars, to-wit:

This is an action in quo warranto, brought by the State of Ohio on the relation of the Prosecuting Attorney of Stark County, Ohio, to oust The Northern Ohio Traction & Light Company from its use of the public highway between the cities of Canton and Massillon, Ohio, and to have adjudged terminated the franchise under which the defendant, said The Northern Ohio Traction & Light Company, claims the right to occupy a portion of said highway with its interurban electric railroad.

The Northern Ohio Traction & Light Company claims the right to maintain and operate its interurban electric railroad upon said highway by virtue of a resolution adopted on February 22nd, 1892, by the Board of County Commissioners of Stark County, Ohio, granting unto William A. Lynch and such railway company as he may cause to be incorporated the right to locate, construct, maintain and operate an electric railroad along either side of the said public highway running between Canton and Massillon, and the amend-

6 ment of said resolution by the Board of County Commissioners of Stark County, Ohio, by resolution adopted May 3rd, 1909, conferring upon The Northern Ohio Traction & Light Company the right to lay a double track upon a small portion of said

highway. The Northern Ohio Traction & Light Company claims this right as assignee of William A. Lynch, through several intermediate conveyances of said franchise by various companies. The defendant, The Cleveland Trust Company, claims an interest in said grant and franchise by reason of a conveyance thereof to it as Trustee, by a mortgage deed of trust executed by The Canton-Massillon Electric Railway Company, a former owner thereof, securing an authorized issue of bonds aggregating one million dollars ($1,000,000.00) face value, of which eight hundred and fifty thousand dollars ($850,000.00) face value have been issued and are still outstanding.

In reliance upon said franchise and grant, The Northern Ohio Traction & Light Company, and its predecessors in title, expended large sums of money in the erection and maintenance of an interurban electric railroad upon said highway, and in addition to the mortgage deed of trust to The Cleveland Trust Company above mentioned, two other mortgage deeds of trust were executed by The Northern Ohio Traction & Light Company's predecessors in title, conveying among other properties, said grant and franchise as security for over a million dollars of bonds issued and now outstanding.

On February 19th, 1913, the Board of County Commissioners of Stark County, Ohio, adopted a resolution which declared that said grant, franchise and conveyance under and by virtue of said resolution of February 22nd, 1892 was thereby terminated, and The Northern Ohio Traction & Light Company directed to remove its interurban electric railroad from said highway, and the Prosecuting Attorney of Stark County, Ohio, was directed to institute this present suit.

7 The said resolution adopted February 22nd, 1892, and the said amendment thereof, contained no provision as to duration of said grant and franchise, and the plaintiff has contended in this suit that said grant and franchise was terminable at will by either the Board of County Commissioners of Stark County, Ohio, or by the defendant, The Northern Ohio Traction & Light Company. The Supreme Court of Ohio by its judgment in the present case upheld this contention, and upon that ground declared said grant and franchise terminated, decreed that the defendants herein be ousted from exercising any rights, privileges or franchises in or upon said highway, and ordered the defendant, The Northern Ohio Traction & Light Company to remove its tracks and switches from said highway.

As would appear from the record and final entry in this case, it was specifically pleaded and claimed by both defendants herein, that since said grant or franchise contained no provision as to the duration thereof, it was perpetual in duration, and that the action of the Board of County Commissioners of Stark County, Ohio, by said resolution adopted February 19th, 1913, was an exercise of authority under the State of Ohio repugnant to the Constitution of the United States. The Supreme Court of Ohio erred in holding that said exercise of authority under the State of Ohio by the Board of County Commissioners of Stark County, Ohio, was not repugnant to the

Constitution of the United States, was not an impairment of the obligation of contract as between the Board of County Commissioners of Stark County, Ohio and the defendants herein, and not a taking without due process of law of the property of said The Northern Ohio Traction & Light Company and said The Cleveland Trust Company, and that the same was not a denial to the defendants herein
8 of the equal protection of the law.

For which errors, The Northern Ohio Traction & Light Company and The Cleveland Trust Company, pray that said decree of the Supreme Court of the State of Ohio be reversed, and that the Supreme Court of the United States render a proper decree in their favor and for costs.

JOHN C. WELTY,
KLINE, CLEVENGER, BUSS & HOLLIDAY,
Solicitors for the Northern Ohio Traction & Light Company.
R. T. SAWYER AND
G. M. CUMMINGS,
Solicitors for the Cleveland Trust Company.

9 [Endorsed:] No. 14114. In the Supreme Court of Ohio. The State of Ohio on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company and The Cleveland Trust Company, Defendants. Assignment of Errors. John C. Welty and Kline, Clevenger, Buss & Holliday, Attorneys for The Northern Ohio Traction & Light Company. Filed Nov. 9, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

10 *Order of Allowance of Writ of Error.*

In the Supreme Court of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

This case coming on to be heard upon application of The Northern Ohio Traction & Light Company and The Cleveland Trust Company, for a Writ of Error, said defendants being represented by Counsel, and it appearing to the Court that the defendants by their pleadings in this case raised the question of the validity of an authority exercised under the State of Ohio, on the ground of its being repugnant to the Constitution of the United States, in that it was an impairment of the obligations of a contract, the taking of the defendants' property without due process of law, and a denial to the defend-

ants of the equal protection of the law, and in the said pleadings the defendants asserted a title, right, privilege, or immunity claimed under the Constitution of the United States, all of which claims were necessarily involved and actually passed upon in the judgment of this Court, and were held adversely to the defendants, the Court holding that the franchise contract under which defendant claimed was granted pursuant to the Statutes of Ohio governing the subject and the Court in construing these Statutes holding that the said franchise did not purport to be and was not under the Statutes of the State a perpetual franchise, and it appearing to the Court that the petitioners' application, therefore, should be allowed, and that a transcript of the record, proceedings and papers upon which the judgment of this Court was rendered, properly certified, should be
11 sent to the Supreme Court of the United States, as prayed for in the petition, in order that such proceedings may be had as may be just in the premises;

Now, Therefore, it is ordered that a Writ of Error be, and hereby is, allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioners be and the same hereby is approved, which may and shall operate as a supersedeas, and that a true copy of the record, assignments of errors, and all proceedings in the case in the Supreme Court of the State of Ohio shall be transmitted to the Supreme Court of the United States, properly certified, as the law directs, in order that the said Court may inspect the same and do what according to law should be done.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Columbus, Ohio, November 9th, 1915.

12 [Endorsed:] 14114. In the Supreme Court of Ohio. The State of Ohio on the relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company, and The Cleveland Trust Company, Defendants. Order of Allowance of Writ of Error. Filed Nov. 9, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

13 *Copy of Bond.*

Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

In the Supreme Court of the United States. In Equity.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Plaintiffs in Error,

vs.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Defendant in Error.

Know all men by these presents, that We, The Northern Ohio Traction & Light Company and The Cleveland Trust Company, both Ohio corporations, as principals, and Massachusetts Bonding & Insurance Company, a Massachusetts corporation, as surety, are held and firmly bound unto the State of Ohio, in the sum of Ten Thousand Dollars ($10,000) lawful money of the United States, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Witness the execution hereof this 10th day of November, A. D., 1915.

Whereas, the above named The Northern Ohio Traction & Light Company and The Cleveland Trust Company have prosecuted a Writ of Error to the Supreme Court of the United States, to
14 reverse the judgment of the Supreme Court of the State of Ohio, in the case of the State of Ohio, on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company, a corporation, and The Cleveland Trust Company, a corporation, Defendants, being case No. 14,114 on the docket of the Supreme Court of the State of Ohio.

Now, therefore, the condition of this obligation is such that if the above named The Northern Ohio Traction & Light Company and The Cleveland Trust Company, shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
By CHARLES M. BUSS, *Its Attorney.*
THE CLEVELAND TRUST COMPANY,
By R. T. SAWYER AND
G. M. CUMMINGS,
Its Attorneys.

[Seal of Mass. Bonding & Ins. Co.]

MASSACHUSETTS BONDING & INSURANCE COMPANY,
By WILLIAM S. HOPKINS,
Its Attorney in Fact.

STATE OF OHIO,
Cuyahoga County, ss:

On this 10th day of November, A. D., 1915 before me, a Notary Public in and for said County and State, personally appeared Chas. M. Buss, who being by me first duly sworn, deposes and says that he is one of the attorneys for The Northern Ohio Traction & Light Company, and that the execution of the foregoing bond on behalf of said Company in the manner above set forth, has been duly and fully authorized by said Company, and is the free act and deed of said corporation, and of himself as such attorney.

CHAS. M. BUSS.

Sworn to, acknowledged before me and subscribed in my presence this 10th day of November, A. D., 1915.

[NOTARY SEAL.] W. T. HOLLIDAY,
Notary Public.

15 STATE OF OHIO,
Cuyahoga County, ss:

On this 10th day of November, A. D. 1915, before me, a Notary Public in and for said County and State, personally appeared R. T. Sawyer, who being by me first duly sworn, deposes and says that he is one of the attorneys of The Cleveland Trust Company, and that the execution of the foregoing bond on behalf of said Company in the manner above set forth has been fully authorized by said Company, and is the free act and deed of said corporation and of himself as such attorney.

R. T. SAWYER.

Sworn to, acknowledged before me and subscribed in my presence this 10th day of November, A. D., 1915.

[NOTARY SEAL.] W. T. HOLLIDAY,
Notary Public.

STATE OF OHIO,
Cuyahoga County, ss:

On this 10th day of November, A. D., 1915, before me, a Notary Public in and for said County and State, personally came William S. Hopkins, known to me to be the attorney in fact of Massachusetts Bonding & Insurance Company, the corporation described in, and which executed the foregoing bond, as Surety thereon, and he being by me duly sworn, deposes and says that he resides in the City of Cleveland, Ohio; that he is the attorney in fact of Massachusetts Bonding & Insurance Company, and knows the corporation seal thereof; that said company is duly and legally incorporated under the laws of the State of Massachusetts; that said Company has complied with the provisions of the laws of Congress allowing certain corporations to be accepted as Surety on bonds; that the seal
16 affixed to the foregoing bond is the corporate seal of said Massachusetts Bonding & Insurance Company, and was here-

unto annexed by the order and authority of the Board of Directors of Said Company; that he signed his name thereto by like order and authority, as attorney in fact of said Company, and that the Treasury Department of the United States has fixed the sum of Two Hundred and Eighteen Thousand and Twelve Dollars and Twenty Two Cents ($218,012.22) as the maximum amount of the penal sum of any single bond which may be executed by said corporation as Surety.

WILLIAM S. HOPKINS.

Sworn to, acknowledged before me and subscribed in my presence this 10th day of November, A. D., 1915.

[NOTARY SEAL.] W. T. HOLLIDAY,
Notary Public.

The within bond is approved both as to sufficiency and form this 11th day of November, A. D., 1915.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

17 [Endorsed:] In the Supreme Court of the United States. The Northern Ohio Traction & Light Company and The Cleveland Trust Company, Plaintiffs in Error, vs. The State of Ohio, on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Defendant in Error. Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio. John C. Welty, and Kline, Clevenger, Buss & Holliday, Attorneys for The Northern Ohio Traction & Light Company.

18 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Ohio, Greetings:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in said Court before you, or some of you, between the State of Ohio, on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, versus The Northern Ohio Traction & Light Company and The Cleveland Trust Company, defendants, the same being case No. 14,114, upon the dockets of the Supreme Court of Ohio, being the highest Court of law or equity of said State in which a decision could be had in said suit, wherein was drawn in question, the validity of a statute of, or an authority exercised under said State of Ohio, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the

title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, and there being manifest error in said decision greatly to the damage of The Northern Ohio Traction & Light Company and The Cleveland Trust Company, the petitioners in error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected *in* full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days (30) from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
19 to be done therein to correct that error, what *is* right, and according to the Laws and Customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 10th day of November 1915.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER,
Clerk of the United States District Court, Northern District of Ohio, Eastern Division.

Allowed Nov. 9th, 1915.
HUGH L. NICHOLS,
Chief Justice.

20 [Endorsed:] No. 14114. In the Supreme Court of Ohio. The State of Ohio on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company and The Cleveland Trust Company, Defendants. Writ of Error. Filed Nov. 11, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

21 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Prosecuting Attorney of Stark County, Ohio, a Political Subdivision of the State of Ohio, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. thirty (30) days from the date hereof pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Ohio, wherein the State of Ohio, on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, is plaintiff and The Northern Ohio Traction & Light Company and The Cleveland Trust Company, are defendants, the same being cause No. 14,114 upon the Dockets of said Court, to show cause, if any there be, why the judgment rendered against said The Northern Ohio

Traction & Light Company and The Cleveland Trust Company, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Ohio, this 9th day of November, A. D. 1915.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

Attest:

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Service of the within citation by copy received and acknowledged this 11th day of November, 1915, at the office of the Prosecuting Attorney of Stark County, Ohio.

A. TALMAGE SNYDER,
Prosecuting Attorney of Stark County, Ohio.

22 [Endorsed:] No. 14114. In the Supreme Court of Ohio. The State of Ohio on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company and The Cleveland Trust Company, Defendants. Citation. Filed Nov. 13, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

23

Præcipe.

In the Supreme Court of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

To the Clerk of the Supreme Court of Ohio:

Please incorporate into the transcript of the Record of the above case which you transmit to the Supreme Court of the United States, at Washington, D. C., in compliance with the Writ of Error issued herein, the following papers, to-wit:

1. Petition.
2. Answer of Defendant, The Northern Ohio Traction & Light Company.
3. Motion of Plaintiff to Strike Out Answer of Defendant, The Northern Ohio Traction & Light Company.
4. Reply of Plaintiff to Answer of Defendant, The Northern Ohio Traction & Light Company.
5. Answer of Defendant, The Cleveland Trust Company.
6. Reply of Plaintiff to Answer of Defendant, The Cleveland Trust Company.
7. Report of A. M. McCarty, Special Master Commissioner, ap-

pointed to take such testimony and proofs as may be offered in this proceeding by all parties.

8. The Printed Record filed in the Supreme Court of Ohio, and used by said Court in the consideration of this cause, consisting of one volume of 206 pages, which sets forth all of the above papers, and no others.

9. Process.

10. Return of Process.

11. All of the Original Exhibits referred to in above-mentioned report of the Special Master Commissioner, to-wit:

1. Defendants' Exhibit 1: Map and Resolutions;

2. Defendants' Exhibit No. 2: Mortgage Deed of Trust from The Canton-Massillon Electric Railway Company to The Cleveland Trust Company, dated May 1st 1900;

3. Defendants' Exhibit No. 3: Mortgage Deed of Trust from The Canton-Akron Electric Railway Company to the Knickerbocker Trust Company, New York, N. Y.

4. Defendants' Exhibit No. 4: Mortgage Deed of Trust from The Canton-Akron Consolidated Railway Company to The Citizens Savings & Trust Company, of Cleveland, Ohio, and S. Reed Anthony, Trustee, dated October 12th 1906.

24 5. Defendants' Exhibit No. 5: Record Book of The Canton-Massillon Electric Railway Company;

6. Plaintiff's Exhibit "A": The defendants', The Northern Ohio Traction & Light Company, printed Annual Statement for the year 1913.

12. All entries in this cause upon the Dockets of the Supreme Court of Ohio.

13. All Journal Entries, Orders and Judgments of the Supreme Court of Ohio in this cause.

14. Copy of opinion rendered by minority of the Supreme Court of Ohio in this cause.

15. Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Writ of Error, Citation and Acknowledgment of Service threof, copy of Bond and Affidavits of Sureties attached thereto, and this Præcipe and Acknowledgment of Service thereof.

WELTY & BURT AND
KLINE, CLEVENGER, BUSS & HOLLIDAY,
Attorneys for Defendants.

Service by copy of the foregoing Præcipe is hereby acknowledged this 29" day of November, 1915.

A. TALMAGE SNYDER,
HUBERT C. PONTIUS,
Attorneys for Relator.

25 [Endorsed:] No. 14114. In the Supreme Court of Ohio. State of Ohio on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company, and The Cleveland Trust Company, Defendants. Præcipe. Filed Dec. 1, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

No. 14114.

Attorneys.	Title of case.	Action.
Hubert C. Pontius, Frank N. Sweitzer, Canton; A. Talmage Snyder, Henry W. Harter, Jr., Canton.	The State of Ohio on the relation of Hubert C. Pontius, the Prosecuting Attorney of Stark County, O., Plaintiff, v. The Northern Ohio Traction & Light Co., a corporation, and The Cleveland Trust Company, Defendants.	Petition in quo warranto.
Kline, Clevenger, Buss & Holliday, Cleveland; John C. Welty, Canton; G. M. Cummings, Raymond T. Sawyer, Cleveland.		

Fees & costs.		Paid by—
Petition	$5.00	F. N. Sweitzer,
Motion	2.00	H. C. Pontius,
"	2.00	H. C. Pontius,
"	2.00	Kline, Clevenger, Buss & Holliday.
Clerk U.— D. Court for writ of Error.	1.00	
Sheriff's	1.03	Kline, Clevenger, Buss & Holliday.
Amount allowed to A. M. McCarty, Special Mas.Com.	303.50	
Am't allowed to Fred Marpe, Steno.'s Services.	52.00	Kline, Clevenger, Buss & Holliday.
Transcript for U. S. Court	71.10	
Certification	5.00	W. T. Holliday.

THIS PAGE BOUND VERTICAL IN BOOK

Docket Entries.

Date.	Memoranda of Pleadings, etc., Filed, Writs Issued, etc.
1913.	
April 2nd.	Petition in Quo Warranto and Precipe for Summons filed.
" "	Summons for defendant issued to the Sheriff of Summit County, returnable April 14, 1913.
" 7th.	Summons for defendant returned and filed, endorsed: "Sheriff's return: The State of Ohio, Summit County, ss: Received this Writ April 4, 1913, at 8:00 A. M., and pursuant to its commands on April 5, 1913, I served the same on The Northern Ohio Traction & Light Company, a corporation, by delivering a true and certified copy thereof with all the endorsements thereon, to Chas. F. Moore, the Secretary of the said The Northern Ohio Traction and Light Company, a corporation, being unable to find the President or Chairman or president of the Board of Directors, or other chief officer, or cashier or treasurer of The Northern Ohio Traction and Light Company, a corporation, in my county. Sheriff's fees, $1.03. David R. Ferguson, Sheriff, F. M. Jewell, Deputy."
May 12th.	Answer filed by defendant.
" 14th.	Answer taken by Mr. Sweitzer, and returned same day.
" 27th.	Motion by relator to strike out parts of answer filed. 5/29/13, Notice of motion filed.
Oct. 7th.	Defendants' supplemental brief filed, 10/7/13, proof of service filed.
Nov. 17th.	Answer taken to Chief Justice, and returned.
" 18th.	Motion of Relator to strike out parts of answer. Reserved for consideration on final hearing of case. J. 26, page 242.
Dec. 5th.	Reply filed.
1914.	
April 21st.	Motion by Plaintiff to substitute copy of Petition in Quo Warranto filed. 4/24/14, Notice of motion and time of hearing filed.
27	
May 5th, '14.	Copy of petition in Quo Warranto filed.
" " "	Papers sent to Toledo Legal Brief & Record Company. 5/16/14, Ret'd.
" " "	Motion by plaintiff to substitute copy of petition—allowed. J. 26, p. 451.
" " "	A. M. McCarty, appointed Master Commissioner, by order of Court. J. 26, p. 460.

" 16th, " Printed record filed. 5/19/14, proof of service filed.
June 10th, " Motion by The Cleveland Trust Company to be made party defendant, brief in support and notice, filed.
" 17th, " Consent to filing of answer by Cleveland Trust Company filed.
" 23rd, " Answer filed by Cleveland Trust Company.
" 23rd, " Motion by Cleveland Trust Company to be made party defendant, etc., allowed.
J. 26, p. 509.

Sept. 14th, Reply to answer of Cleveland Trust Company filed.
Dec. 22nd, Report of Special Master Commissioner filed.
1915.
Jan. 7th. Printed record filed, 3/24/15, proof of service filed.
" 21st. Bill of A. M. McCarty, for services as special manster commissioner, filed.
" " Bill of Fred Marpe for stenographic services for special master commissione , filed.
Jan. 21st. Order allowing Master $303.50 for services, and stenographer $52.00 for services.
J. 27, p. 10.

April 9th. Plaintiff's printed brief filed. 4/16/15, proof of service filed.
" 28th. Defendant's printed brief, The Cleveland Trust Company, filed, 4/29/15, proof of service filed.
" 29th. Defendant's printed brief, (Northern Ohio Traction & Light Co.) filed. 4/29/15, proof of service filed.
May 24th. Plaintiff's printed reply brief filed, 5/26/15, proof service filed.
Oct. 19th. Judgment for plaintiff on authority of Gas. Company v. Akron, 81 Ohio St., 33.
J. 27, p. 182.

Nov. 9th. Petition for writ of error filed.
" " Assignment of errors filed.
" " Order of Allowance of Writ of Error. Bond $10,000.00.
J. 27, p. 201.
" 11th. Writ of Error filed.
" " Receipted bill for cost of writ of error filed.
" " Copy of writ of error lodged for Clerk and defendant.
" " Bond on writ of error in sum of $10,000.00, dated Nov. 10, 1915, signed by defendants in error (by their attorneys of record) as principals and by Massachusetts Bonding & Insurance Company, (by Wm. S. Hopkins, its attorney in fact) as surety filed.
" " Statement of financial condition of surety and power of attorney of William S. Hopkins, filed.
" 13th. Citation and acknowledgment of service filed.
Dec. 1st. Praecipe for Transcript and acknowledgement of service filed.
" 4th. Certified copy of minority opinion filed.

28 *Journal Entries.*

1913.

May 18th. Motion of relator to strike out parts of answer.

"It is ordered by the Court that this motion be, and the same hereby is, reserved for consideration on final hearing of the case."

J. No. 26, p. 242.

1914.

May 5th. Motion by plaintiff to substitute copy of petition.

"It is ordered by the Court that this motion be, and the same hereby is, allowed."

J. 26, p. 451.

May 5th. Motion by relator for appo-ntment of Master Commissioner, in cause No. 14114, on the General Docket.

"This day this cause came on to be heard upon the motion of the relator for the appointment of a special master commissioner, and the court being fully advised in the premises, finds that said motion is well taken and does hereby appoint A. M. McCarty as Special Master Commissioner herein, and authorizes and empowers him, upon giving reasonable notice to the parties hereto, to hear such oral testimony as may be desired to be submitted to him by the parties to this action, and to take such testimony and proofs, either within or without said state of Ohio, as the relator or defendant may desire, pertinent to the point at issue in this proceeding and raised by the pleadings filed herein, and to issue all necessary processes and subpœnas duces tecum for the attendance of witnesses and the production of such books and other written evidence as may be competent, and to administer all necessary oaths and to report in writing all such examinations and testimony to the court, without unnecessary delay."

J. 26, p. 460.

June 23rd. Motion by The Cleveland Trust Company to be made party defendant, etc.

"It is ordered by the Court that this motion be, and the same hereby is, allowed."

J. 26, p. 509.

1915.

Jan. 21st. "This day this cause *upon* to be heard upon the application of the Special Master Commissioner for the allowance of his compensation for services herein, and the court being fully advised in the premises, and by consent of the parties, it is ordered that the bill of A. M. McCarty, Special Master Commissioner, in the sum of three hundred and three and 50/100 ($303.50) dollars be, and the same hereby is, allowed. It is also

ordered by the consent of parties that the bill of Fred Marpe for stenographic services in reporting and making transcript of the testimony before the Master Commissioner in the sum of fifty-two and 00/100 ($52.00) dollars, be, and the same hereby is, allowed."

J. 27, p. 10.

29

1915.

Oct. 19th. "This cause came on to be heard on the pleadings and the evidence and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of Gas Company v. The City of Akron, 81 Ohio St., 33. It is, therefore, ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges and franchise described in the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches from the said Canton and Massillon road between the corporate limits of the said Cities of Canton and Massillon within ninety days from this date. It is further ordered and adjudged that the paintiff recover of the defendant its costs herein, taxed at $—."

J. 27, p. 182.

1915.

Nov. 9th. Order of Allowance of Writ of Error.

"This case coming on to be heard upon the application of The Northern Ohio Traction and Light Company and The Cleveland Trust Company, for a writ of error, said defendants being represented by counsel, and it appearing to the court that the defendants by their pleadings in this case raised the question of the validity of an authority exercised under the State of Ohio, on the ground of its being repugnant to the Constitution of the United States, in that it was an impairment of the obligations of a contract, the taking of the defendants' property without due process of law, and a denial to the defendants of the equal protection of the law, and in the said pleadings the defendants asserted a title, right, privilege or immunity claimed under the Constitution of the United States, all of which claims were necessarily involved and actually passed upon in the judgment of this court, and were held adversely to the defendants, the Court holding that the franchise contract under which defendant claimed was granted pursuant to the Statutes of Ohio governing the subject and the court in construing these Statutes holding that the said franchise did not purport to be and was not under the Statutes of the State a perpetual franchise, and it ap-

pearing to the court that the petitioners' application, therefore, should be allowed, and that a transcript of the record, proceedings and papers upon which the judgment of this court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, in order that such proceedings may be had as may be just in the premises;

Now, therefore, it is ordered that a writ of error be, and hereby is, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioners be, and the same hereby is,
30 approved, which may and shall operate as a supersedeas, and that a true copy of the record, assignments of errors, and all proceedings in the case in the Supreme Court of the State of Ohio shall be transmitted to the Supreme Court of the United States, properly certified, as the law directs, in order that the said Court may inspect the same and do what according to law should be done.

"HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio."

J. 27, p. 201.

31 No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio,
v.
THE NORTHERN OHIO TRACTION AND LIGHT COMPANY

(No. 14114—Decided October 19, 1915.)

In Quo Warranto.

Mr. A. Talmage Snyder, Prosecuting Attorney; Mr. Henry W. Harter, Jr., Assistant Prosecuting Attorney and Mr. Hubert C. Pontius, for plaintiff.

Messrs. Kline, Clevenger, Buss & Holliday and Mr. John I. Welty, for defendant.

Mr. R. T. Sawyer and Mr. G. M. Cummings, for The Cleveland Trust Co., defendant.

32 JONES, *J.*, dissenting:

The sole question in this case as presented is whether the board of county commissioners can revoke and annul a franchise granted by the state without having the power so to do delegated to it by the sovereign authority.

The question of the perpetuity of the franchise does not arise

in this case. Did it arise, the question is fully met and answered by those provisions of the state constitution which authorize the general assembly, and that body alone, to alter or revoke any corporate law passed or special privilege conferred by the law making power.

When the Dartmouth College case (4th Wheat. 518) was decided in 1819 Mr. Justice Story suggested in his opinion that the legislation of the various states, conferring corporate rights and privileges, in order to avoid any inhibition of the contract impairment clause of the constitution, might contain a provision reserving to the legislature the right to amend or repeal the rights so conferred. In accordance with this suggestion various states, including Ohio, prior to 1851, in the legislation granting corporate rights and privileges in perpetuity, expressly reserved the right to amend or repeal such statutes. But when the people of Ohio adopted the constitution of 1851 they, for their own protection, carried these provisions for the right of amendment, revocation or repeal
33 into the constitution itself. Article I, section 2 of that instrument provides that, "No special privileges or immunities shall ever be granted, that may not be altered, revoked or repealed by the general assembly."

And Article XIII, section 2 provides that, "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." These provisions of the constitution become an integral part of every law passed by the legislature, and enter into all legislation subsequently enacted, and into every contract made or franchise thereafter granted, with the same force and effect as if incorporated bodily into such contract or legislation. These two sections of the constitution have usually been construed together by both the state and federal courts.

The franchise granted was by its terms indefinite in time, and the county commissioners, because of that fact, claim the authority to terminate at any time, and at their will, the operation of the road and oust it from its franchise upon the public highways of the state.

The right of occupancy of the public highways is a franchise, and as such is derived from the state itself. It is true that municipalities and boards of county commissioners may consent or withhold consent for the occupation of the public highways, and may impose terms and conditions under which such occupancy
34 may be had, but the franchise itself emanates from the state which has power at all times to limit the control and supervision of its subsidiary agencies. State v. Gas Light & Coke Co., 18 Ohio St., 262; State v. Telephone Company, 72 Ohio St., 60; Farmer v. Telephone Co., 72 Ohio St., 526; Grand Trunk Western Ry. Co. v. South Bend, 227 U. S., 544-555; Louisville v. Cumberland Telephone Co., 224 U. S., 649.

There are many special privileges enjoyed by corporations which do not accrue to individuals, and among others is the privilege or franchise of occupying streets of the municipalities and the highways of the state; the right of consolidation of corporate bodies; the power to make, alter and regulate rates of fare, etc. Shields v.

The State, 26 Ohio St., 86, affirmed in Shields v. State, 95 U. S., 319; Railway Co. v. Telegraph Association, 48 Ohio St., 390-432; Greenwood v. Freight Co., 105 U. S., 13. But it has been held that while these privileges and franchises, though perpetual in form, may be revoked, it does not divest the vested rights of the shareholders in the corporate property nor their rights of contract or choses in action. Greenwood v. Freight Co., supra.

This brings us to the main question involved in this case. Because the grant was indefinite in time to the predecessor of the defendant, could the board of county commissioners at any time revoke the franchise granted the former by the state and oust it and
35 its property from the public highways? And in this connection it must be conceded that there is no statutory authority whatever for the county commissioners to make such a revocation. Neither by the terms of the grant nor resolution of the county commissioners to the predecessor of this defendant was there reserved such power. The question under consideration is highly important, and I know of no adjudicated authority under the facts stated, which sanctions that view. No case has been cited in which this principle was sustained. The courts have held with practical unanimity that wherever one of the agencies of the sovereign power has endeavored to revoke a franchise which could only come from the state, it can be done only by virtue of the power directly delegated by the state or reserved in the grant itself, under such delegation.

There is a wide distinction between the regulative powers incidental to municipal grants based upon the exercise of the police powers and the attempt, as in this case, to evict and destroy the public use. This distinction is plainly made in the case of Grand Trunk Western Ry. Co. v. South Bend, 227 U. S., supra.

An examination of the revoking resolution of February 19, 1913, shows no complaint of the character of the use made as affecting the public welfare, but the resolution was based solely on the claim to terminate the franchise at will, because it savored of perpetuity.

In this particular case the county commissioners of Stark
36 county, Ohio, on February 22, 1892, passed a resolution, granting to the predecessor of this defendant the right to construct and operate an electric road on the state highway between Canton and Massillon. This grant was not for a definite time, neither did the resolution of the commissioners reserve the right to revoke this grant. In the meantime large investments were made, bonds issued and the operation of the road continued. Later a controversy arose between the commissioners and the company as to the reduction of fares betwen the two cities, and upon disagreement relating thereto, the county commissioners, on the 19th day of February 1913 passed a new resolution, reciting that the term of grant was indefinite and continued only so long as the parties might agree. They therefore terminated the grant and ordered the prosecuting attorney to bring suit ousting the company from the operation of its franchise, and directing the removal of all its

property, equipment and belongings from the state highway. The result was this suit in quo warranto.

As already stated, the Constitution of Ohio has lodged the power of revocation, alteration or amendment of corporate grants and privileges, whether perpetual or otherwise, in the legislative body of the state, and it alone has the power to revoke these privileges, which it may do either on its own initiative or by expressly delegating this power to its municipal agencies. And in this connection it may be stated, while a grant may be in terms perpetual, since the constitution has reserved to the state the right to repeal,
37 in that view it cannot be held to be perpetual, when the state acts under its constitutional prerogative.

The following cases hold that where no power to alter or repeal has been reserved, either in the law or the municipal ordinance, that any subsequent action repealing the franchise was an impairment of the contract and unconstitutional under the contract clause of the constitution. Grand Trunk Ry. Co. v. South Bend, supra; Owensboro v. Cumberland Telephone Co., 230 U. S., 58; Boise Water Co. v. Boise City, 230 U. S., 84· Hudson Telephone Co. v. Jersey City, 49 N. J. L. Reports, 303.

In the first case Mr. Justice Lamar said on page 555:

"In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent, except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given the condition precedent had been performed and the street franchise was thereafter held, not from the city, but from the state which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself."

38 Mr. Justice Lurton delivered the opinion in both of the cases reported in the 230 U. S. Reports, and on page 72 of the former case said:

"When the grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved."

In that case Mr. Justice Day delivered the dissenting opinion which was concurred in by three of his associate justices. However, it will be observed, upon examination of this dissenting opinion, that there was no contention as to the principle that the power of revocation must be delegated to the municipal authority, but was based solely upon the view that such delegation of authority had been made by the statutes of Kentucky, for Mr. Justice Day closes his opinion in the following language: (Page 83 of the Owensboro case).

"In my view the case in its present attitude comes to this: The

permission to place poles and string wires in the city of Owensboro was granted under a charter which expressly reserved the right to repeal by subsequent act of the municipal legislature."

And in the New Jersey case of Hudson Telephone Co. v. Jersey City, supra, approvingly cited by Judge Lurton in the former case, the learned judge there stated on page 305:

"No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the
39 power to revoke a permission once granted. The grant of the franchise to this company was subject only to a repeal or alteration by the legislature, and when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the power of a common council to strip them of any right so acquired."

A judgment of ouster has been rendered by the state court in this case on the authority of the East Ohio Gas Co. v. City of Akron, 81 Ohio St., 33; but this case is readily distinguished from the case at bar. In the Akron case the legislation of the state with reference to gas companies became a part of the municipal grant, and that legislation provided that the municipalities were "empowered to regulate from time to time" the price of gas, and provided further that in case the price was fixed by the council for a period of not exceeding ten years, that upon written acceptance by the company it should not be lawful for the council to require gas to be furnished at a less price during the period agreed on not exceeding ten years. Pursuant to this legislation council passed an ordinance on the 26th day of September 1898, granting the company the use of its streets, and attached a condition that for the first five years it should not exceed twenty-five cents per one thousand feet of gas, and for the next five years not exceeding thirty cents per one thousand feet of gas. After the expiration of
40 ten years from September 26, 1898, council passed another ordinance fixing the price of gas to be furnished by that company at twenty cents per one thousand feet, and providing that the company for the ensuing ten years should not charge more than this lower rate provided by the ordinance. The company declined to accept the terms, and signified its intention of discontinuing its business in the city, whereupon the city endeavored to restrain it from withdrawing, claiming that its franchise was a perpetual one and that it was obliged to pay the changing rates provided by the city. The plain distinction between that case and this is that in the Akron case, both by statute and under the ordinance itself, a definite time could be fixed between the parties for the furnishing of gas, with a proviso, however, in both the statute and ordinance that the rates for gas should not be changed for a period of ten years. When this contract terminated between the parties, in case there was no renewal thereof, the franchise was at an end, and of course either party could withdraw from further continuance under the grant. The state of Ohio had specifically authorized council to make a grant "from time to time," and when such a grant was made and accepted under the provisions of that law the time did

become definite. To hold otherwise than it did in the Akron case would require the parties to be held to a contract that necessarily lacked mutuality, and it is so stated by the judge delivering the opinion.

41 In this case the state of Ohio did not authorize the county commissioners to grant a franchise from time to time or to provide for any contract for time stipulation between the parties. The grant of the use of the public highway was indefinite as to time, and the principle involved here is covered by the following propositions of the syllabus in the case of Boise Water Co. v. Boise City, supra, as follows:

"Where there is no limitation in the general law of the state, nor in the charter of the city, as to duration of franchise for public utilities in the streets, the grant of an easement for that purpose, not specifying a period of duration, is in perpetuity."

"Where there is a limitation in the law of the state of duration for which easements in streets can be granted by municipalities, an easement granted for an indefinite period continues for the statutory period."

"There is a distinction between a definite grant for a period longer than the law of the state permits and an indefinite grant; while the former may be altogether void as an effort to obtain that which is illegal, the latter is simply limited in duration to the period established by law, and during that time it is protected from impairment by the contract clause of the Constitution of the United States."

This distinction is also noted in Old Colony Trust Co. v.
42 Omaha, 230 U. S., 100.

Another distinction is that in the Akron case there was a delegated power to the municipal council pertaining to gas rate stipulations which they could agree upon from time to time, but in the present case the legislature has granted to the board of county commissioners the naked authority of permitting the county commissioners, outside of municipalities, to grant an easement in the public highways, and to fix terms and conditions of construction. Revised Statutes Secs. 3438-3443.

Regulatory powers are lodged in the county boards to make reasonable terms and conditions under which these highways should be occupied, but would not permit them to employ at their mere pleasure the destructive power endeavored to be utilized in this case. This power is lodged in the legislature of the state.

Upon the facts stated plaintiff is not entitled to a judgment of ouster.

Donahue and Newman, JJ., concur.

43 I do hereby certify that the foregoing (12 pages) is a true and correct copy of the dissenting opinion by Judge Thomas A. Jones, concurred in by Judges Maurice H. Donahue and Oscar W. Newman, in the case of The State of Ohio, ex rel. Hubert C. Pontius, Prosecuting Attorney, vs. The Northern Ohio Traction & Light Company, as said dissenting opinion is on file in this office; and

I do hereby further certify that no opinion has been prepared or filed in this office by the majority of the Court rendering the decision.

In witness whereof I have hereunto set me hand and seal this 1st day of December, A. D., 1915.

E. O. RANDALL,
Reporter of the Supreme Court of Ohio.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 12/1/15. E. O. R.]

[Endorsed:] Filed Dec. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

44 RECORD.

Supreme Court of Ohio.

No. 14114

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, a Corporation, Defendant.

Petition in Quo Warranto.

Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio. Kline, Clevenger, Buss & Holliday and John I. Welty, Attorneys for Defendant.

Filed Jan. 7, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

45 In the Supreme Court of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, a Corporation, Defendant.

Petition in Quo Warranto.

[Filed April 2, 1913.]

Now comes Hubert C. Pontius, prosecuting attorney of Stark county, Ohio, and gives the court to understand and be informed:

1st. That the defendant herein, The Northern Ohio Traction and Light Company, is a corporation duly organized under the laws of the state of Ohio, and engaged in operating an interurban electric railroad in Stark county in the state of Ohio, on a public high-
46 way known as the Canton-Massillon road, between the cities of Massillon and Canton.

2nd. That on or about February 22, 1892, the county commissioners of Stark county, Ohio, passed a resolution, which is in matter and form as follows: "Resolution for Right of Way for Electric Railway.

Resolved, That the right is hereby granted to William A. Lynch and to such railroad company as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails in the customary manner with the necessary poles and wires for an electric railroad. The ties shall not be laid nearer to the center line of said road than nine feet, except where switches are constructed, at which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the traveled portion of said road, or nearer than nine feet from the center of the road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and its bed shall be regravelled so as to restore it to its present state of usefulness. Instead of
47 locating said railroad on one side of the center line as above provided, the same may be located along the center line of said road along the whole or any portion thereof provided that in such case wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feet wide in fills, and each roadway shall be gravelled (to a width of ten feet and eight inches in thickness), and put in a condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossings shall be constructed of plank or other suitable materials, at all public highway crossings or intersections and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road, shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor changes in location and the plans and methods of

grading the highway as the public interests may require. It
48 being understood and agreed that said Wm. A. Lynch or the railroad company, before commencing any part of said work shall enter into a bond in the sum of ten thousand dollars, conditioned for the faithful performance of the conditions enjoined upon them by this resolution.

This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5000) five thousand dollars conditioned that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said road."

3rd. That the aforesaid resolution is recorded on pages 17, 18 and 19 of volume 8, Commissioners' Journal of Stark county, Ohio.

4th. That the defendant claims it is operating said interurban electric railroad by virtue of the authority it claims to have as assignee, transferee and successor of said William A. Lynch, under the aforesaid resolution.

5th. That on the 19th day of February, 1913, the county commissioners of Stark county, Ohio, in session, duly, regularly and legally passed the following resolution, which said resolution is recorded on pages 323, 324 and 325 of Volume 13, Commissioners' Journal of Stark county, Ohio:

49 *"Resolution of the County Commissioners of Stark County, Ohio.*

Whereas, the county commissioners of Stark county, Ohio, on the 22nd day of February, 1892, passed a resolution appearing on pages 17, 18 and 19 of Volume 8, Commissioners' Journal, Stark county, Ohio, and said resolution is as follows:

'Resolved, That the right is hereby granted to William A. Lynch and to such railroad company as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails in the customary manner with the necessary poles and wires for an electric railroad. The ties shall not be laid nearer to the center line of said road than nine feet, except where switches are constructed, at which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the travelled portion of said road, or nearer than nine feet from the center of the road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and

its bed shall be regravelled so as to restore it to
50 its present state of usefulness. Instead of locating said railroad on one side of the center line as above provided, the same may be located along the center line of said road along the whole or any portion thereof provided that in such case wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feet wide in fills, and each roadway shall be gravelled to a width of ten feet and eight inches in thickness, and put in a condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossing shall be constructed of plank or other suitable materials, at all public highway crossings or intersections and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially, or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road, shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor
51 changes in location and the plans and methods of grading the highway as the public interests may require. It being understood and agreed that said William A. Lynch or the railroad company, before commencing any part of said work shall enter into a bond in the sum of ten thousand dollars, conditioned for the faithful performance of the conditions enjoined upon them by this resolution. This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5,000) five thousand dollars conditioned that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said road, and

Whereas, an electric interurban railway, some time after the passage of said resolution, was built and constructed from Canton, Ohio, to Massillon, Ohio, upon the state road between said cities, the course described in the aforesaid resolution, and

Whereas, cars are now being operated upon said interurban electric railway and have been so operated for some years, by persons or companies, claiming to derive their rights and title from the said William A. Lynch, and claiming that their said title, right and interest emanate from the aforesaid resolution, and

52 Whereas, The Northern Ohio Traction and Light Company, a corporation, is now and has been, for several years last past, operating the interurban electric cars over said railway and carrying passengers over said interurban electric railway between the cities of Canton and Massillon, Ohio, and

Whereas, the said The Northern Ohio Traction and Light Company claims its rights, interests and privileges for the conducting of said business as assignee, transferee and successors of the said William A. Lynch, and his assigns or successors, based and founded upon the aforesaid resolution passed by the county commissioners of Stark county, Ohio, on the 22nd day of February, 1892, and recorded on pages 17, 18 and 19 of Volume 8, Commissioners' Journal, Stark county, Ohio, and

Whereas, the commissioners of the county of Stark and state of Ohio contend,

First. That the said William A Lynch, at the time of the enactment of said resolution of the commissioners of Stark county, was not an incorporated company and was not entitled to the privileges of which a company incorporated in Ohio for the purpose of owning and operating an interurban electric line, was not such an entity that he could accept the interests, rights and titles granted by the county commissioners of Stark county in the aforesaid resolution.

Second. That whatever right, title, interest and privilege,
53 if any, were conveyed by the aforesaid resolution to the said William A. Lynch were conveyed and granted to the said William A. Lynch and to him alone, said grant and conveyance being a personal one.

Third. That the term of the grant included in the aforesaid resolution of the county commissioners, passed by the county commissioners on the 22nd day of February, 1892, as aforesaid is an indeterminate one, continuing from day to day and that said term extends and continues only so long as both parties to said grant and conveyance, to wit: Stark county, Ohio, through its board of county commissioners, the grantor, and William A. Lynch, or any company he might organize and incorporate, or any successor of the said William A. Lynch or the said company he might organize, the grantee, agree and consent, and that said grant and conveyance can be terminated at any time by either party to said grant or conveyance, or those claiming to hold or holding under said grant.

Now, therefore, be it resolved by the board of commissioners of Stark county, Ohio, assembled in session, that said term of said grant and conveyance be terminated on this date, to take effect on this date, and that the board of commissioners of Stark county, Ohio, refuse to extend to The Northern Ohio Traction and Light Company, which company claims to hold, title, right and interest as the successor, assignee and transferee of the aforesaid William
54 A. Lynch and his successors and assignees, or either of them, the term for the operation of the afore-aid interurban electric railroad beyond this date.

Be it resolved that The Northern Ohio Traction and Light Company be notified that the commissioners of Stark county, Ohio, have on this date terminated the term of said grant and conveyance, under which said grant The Northern Ohio Traction and Light Company claim the right and privilege of operating said interurban electric railroad between Canton and Massillon, Ohio, and that the county of Stark and state of Ohio and the board of commissioners of Stark

county, Ohio, will regard and do regard the operation of an interurban electric railroad between Canton and Massillon, Ohio, on said state road running between Canton and Massillon, Ohio, from this date forward a usurpation and infringement upon the rights of said Stark county, Ohio, and said board of commissioners of said Stark county, Ohio.

Be it resolved that the prosecuting attorney of Stark county, Ohio, be directed and is hereby directed to take whatever steps he may deem necessary and advisable to prohibit and prevent The Northern Ohio Traction and Light Company or any other person, individual, corporation or company from continuing to operate an interurban electric railroad between the cities of Massillon and Canton, Ohio, on the state road, running between said cities by virtue of any rights, title or interest the said The Northern Ohio Traction and Light Company or any other person, individual, corporation or company may claim as resulting from the aforesaid resolution, enacted by the county commissioners of Stark county, Ohio, on February 22, 1892.

Be it resolved that the said The Northern Ohio Traction and Light Company be directed and is hereby directed to remove all its property, equipment and belonging- from the right of way described by the aforesaid resolution, herein referred to as having been passed by the county commissioners of Stark county, Ohio, on February 22, 1892, and now occupied by the said The Northern Ohio Traction and Light Company, at once.

Be it resolved that a copy of this resolution be sent or delivered, and the auditor of Stark county, Ohio, is hereby directed to send or deliver to The Northern Ohio Traction and Light Company a copy of this resolution."

6th. That on the 21st day of February, 1913, a copy of the resolution set forth in item 5 herein was delivered to said defendant.

7th. That the said defendant continues to operate and is now operating its electric cars and electric railroad on the said public highway known as the Canton-Massillon road between the cities of Massillon and Canton in Stark county, Ohio, which said conduct plaintiff avers is without warrant or authority of law.

Wherefore, because of the premises and matters herein set forth, the plaintiff prays the advice of the court, and that the defendant, to wit, The Northern Ohio Traction and Light Company, be compelled to answer by what warrant it claims to have the use and to enjoy the rights, privileges and franchises aforesaid, in the operation of its said interurban electric railroad between the cities of Canton and Massillon, Ohio, in said county and state; and that it be ousted from exercising the same and be compelled to remove its tracks and switches from the said Canton-Massillon road between the corporate limits of the said cities of Canton and Massillon, and plaintiff further prays that such other and further relief be granted in the premises as to the court may seem just and proper.

HUBERT C. PONTIUS,
Prosecuting Attorney of Stark County, Ohio.

55½ *Summons in Quo Warranto.*

THE STATE OF OHIO,
City of Columbus, ss:

Supreme Court of Ohio.

To the Sheriff of Summit County, Greeting:

You are commanded to notify The Northern Ohio Traction and Light Compan*t*, a corporation, that Hubert C. Pontius, Prosecuting Attorney within and for the County of Stark and State of Ohio, filed a petition in the nature of a Quo *Q*arranto against it in the Supreme Court of the State of Ohio, and that it is required to Demur or Answer to said Petition within thirty days from the return day of this Writ.

You will make due Service, and return this Writ April 14th, A. D. 1913.

Witness my hand and the Seal of the Supreme Court of Ohio, this second day of April, A. D. 1913.

[SEAL.]

FRANK E. McKEAN,
Clerk of Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

Sheriff's Return.

THE STATE OF OHIO,
Summit County, ss:

Received this writ April 4, 1913, at 8.00 A. M. and pursuant to its command on April 5, 1913, I served the same on The Northern Ohio Traction and Light Company, a corporation, by delivering a true and certified copy thereof with all the endorsements thereon, to Charles F. Moore, the Secretary of the said The Northern Ohio Traction and Light Company, a Corporation, being unable to find the president, or chairman or president of the board of directors, or other chief officer, or cashier or treasurer of The Northern Ohio Traction and Light Company, a corporation in my County.

DAVID R. FERGUSSON, *Sheriff.*
F. M. JEWELL, *Deputy.*

Sheriff's Fees.

Service	$.75
Mileage	.16
Docket	.10
Postage	.02
Total	$1.03

[Endorsed:] Supreme Court of the State of Ohio. No. 14114. The State of Ohio on the relation of Hubert C. Pontius, the Prose-

cuting Attorney of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction and Light Company, a corporation, Defendant. Action in Quo Warranto. Summons in Quo Warranto. Returnable April 14, 1913. Answer due 30 days from return of Writ. Returned and Filed Apr. 7, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk.

56 *Answer.*

[Filed May 12, 1913.]

Now comes the defendant, The Northern Ohio Traction & Light Company, and for its answer to the petition in quo warranto says:

First Defense.

That on the 1st day of April, 1913, in an action in the Court of Appeals in and for Stark county, Ohio, wherein the state of Ohio on the relation of the then prosecuting attorney for Stark county, Ohio, Charles Krichbaum was plaintiff, and this defendant was defendant, upon the same cause of action alleged in the petition herein
57–59 and involving the same subject matter as this action said action in said court being number 928 upon the docket of said court, said Court of Appeals entered a final judgment on the merits thereof, dismissing said plaintiff's petition, and holding therein that the grant or franchise under the resolution of February 22nd, 1892, of the county commissioners of Stark county, set forth in the petition herein, is a perpetual grant to William A. Lynch, his successors and assigns, and that this defendant as the owner of said grant has a valid right to operate its electric railroad between the cities of Canton and Massillon, Ohio.

All of the issues so decided in and by said judgment were directly raised and necessarily involved in said action. Said judgment has not since been reversed or modified, and is still a final judgment between the parties hereto upon the cause of action set forth in the petition herein. Said judgment is a bar to this action and by reason of the holdings of said judgment the plaintiff herein is estopped to deny that said grant by and under a resolution adopted by the board of county commissioners of Stark county on February 22nd, 1892, (which resolution is set forth in the petition herein) is a perpetual and assignable grant, and that this defendant is the true and lawful owner of said grant.

Second Defense.

This defendant still protesting that it should not be required to answer further in this action, if it should be so required, for
60 its second defense, says: That more than five years elapsed prior to the commencement of this action, after the act complained of in the petition herein was done or committed, and that for more than twenty years prior to the commencement of this action,

this defendant, and those through and under whom it claims its power and franchises under and by virtue of deeds of assignment hereinafter set forth, have continuously exercised the power or franchise to operate a street railroad between the cities of Canton and Massillon, Ohio, upon the highway commonly known as the Canton-Massillon road, under and by virtue of said resolution of February 22nd, 1892.

Third Defense.

This defendant, still protesting that it should not be required to answer further in this action, if it should be so required, for its third defense, says:

It admits that on or about February 22, 1892, the county commissioners of Stark county, Ohio, passed a resolution as set forth in the petition herein, and that said resolution is recorded on pages 17, 18 and 19 of Volume 8, Commissioners' Journal of Stark county, Ohio; it admits that it is operating an interurban electric railroad under and by virtue of its right as assignee, transferee and successor of William A. Lynch, under the authority of the aforesaid resolution.

It admits that on or about the nineteenth day of February, 1913, the county commissioners of Stark county passed a resolution,
61 which is recorded on pages 323, 324 and 325 of Volume 13, Commissioners' Journal of Stark county, Ohio, and which is set forth in the petition herein.

This defendant, however, denies the statements, allegations, and declarations of contention contained in said resolution except as hereinbefore specifically admitted.

It admits that a copy of said last mentioned resolution was delivered to the defendant; it admits that this defendant continues to operate and is now operating its electric cars and electric railroad on the public highway, known as the Canton-Massillon road, between the cities of Canton and Massillon in Stark county, Ohio.

Further answering, this defendant denies each and every allegation in said petition contained except as herein specifically admitted or qualified.

Fourth Defense.

This defendant still protesting that it should not be required to further answer, if it should be so required, for its fourth defense, reincorporating herein each and every allegation of its third defense as fully and completely as though specifically repeated herein, says:

That under said resolution duly adopted by the county commissioners of Stark county, Ohio, on or about February 22nd, 1892, there was granted to William A. Lynch and to such railroad company as he might cause to be incorporated and his and its assigns,
a perpetual right to locate, construct, maintain and operate
62 an electric railroad along either side of the State road running between Canton and Massillon between the line of the Canton Street Railway and the corporation limits of the city of Massillon.

Thereafter under and in accordance with the authority of said resolution of February 22, 1892, said William A. Lynch did cause to be duly incorporated The Canton-Massillon Electric Railway Company, under and by virtue of the laws of the State of Ohio, and sold, transferred and assigned to said The Canton-Massillon Electric Railway Company, its successors and assigns, all his right, title and interest in and to the grant conferred upon him by said resolution of February 22, 1892.

Said The Canton-Massillon Electric Railway Company purchased the rights of said William A. Lynch in and to said grant under said resolution of February 22, 1892, in good faith and for a valuable consideration in reliance upon the validity and perpetuity of said grant and said assignment, and in like reliance erected and operated an extensive and valuable interurban road upon the highway running between Canton and Massillon, and for the purpose of raising money to pay for said construction, issued and sold its capital stock to the amount of many thousands of dollars, and on or about May 1 1900, placed a mortgage upon said railroad, securing its issue of bonds for the sum of eight hundred and fifty thousand dollars
63 ($850,000), which bonds were sold to the general investing public, and are still outstanding, unpaid and uncancelled.

Thereafter The Canton-Massillon Electric Railway Company sold and transferred all its right, title and interest in and to its said grant and franchise under said resolution of February 22, 1892, to The Canton-Akron Railway Company, its successors and assigns.

Said The Canton-Akron Railway Company continued the operation of said road and made valuable improvements thereon, and to pay the purchase price of said railroad, issued and sold to the investing public its capital stock to the extent of many thousands of dollars, and to pay for said improvements and betterments, on or about March 1, 1902, placed a mortgage upon said railroad, securing its issue of bonds in the sum of two million dollars ($2,000,000). Of said two million dollars ($2,000,000) of bonds, under the terms of said mortgage, eight hundred and fifty thousand dollars ($850,000) par value were reserved to the mortgage trustee, as security for the payment of said eight hundred and fifty thousand dollars ($850,000) bond issue of said The Canton-Massillon Electric Railway Company, and are still so held; but the remainder of said two million dollars ($2,000,000) bond issue, to wit, one million one hundred and fifty thousand dollars ($1,150,000) par value were sold to large numbers of the investing public, and are still outstanding, unpaid and uncancelled.

64 Thereafter, on or about October 1, 1906, said The Canton-Akron Railway Company sold and transferred all its right, title and interest in and to its said grant and franchise under said resolution of February 22, 1892, to The Canton-Akron Consolidated Railway Company, its successors and assigns; said The Canton-Akron Consolidated Railway Company continued the operation of said railroad and made valuable improvements thereon, and to pay the purchase price for said road issued and sold to the investing public its capital stock to the amount of many thousands of dollars, and to

pay for said improvements and betterments, placed a mortgage upon said road securing its bonds for the sum of two million five hundred thousand dollars ($2,500,000); of which bonds two million dollars ($2,000,000) were issued and sold to large numbers of the investing public and of which one million seventeen thousand dollars ($1,017,000) par value are still outstanding, unpaid and uncancelled.

Thereafter on or about October 13, 1906, said The Canton-Akron Consolidated Railway Company, sold and transferred all its right, title and interest in and to its said grant and franchise under said resolution of February 22, 1892, to this defendant, its successors and assigns.

This defendant continued the operation of said railroad, and made many valuable improvements thereon, and to pay the purchase price of said railway issued and sold to the investing public its capi-
65 tal stock for the amount of many thousands of dollars.

This defendant says that said railroad has been in continuous operation by said William A. Lynch and his above described successors in interest ever since the early part of the year 1892; that the several boards of county commissioners of Stark county, between that time and the filing of the petition herein had full knowledge of all the facts herein stated, and neither any said boards of county commissioners, nor any members thereof, nor any residents of Stark county, have ever made any objection to any of the aforesaid assignments of said grant or franchise, nor to the operation of said electric railroad thereunder by this defendant or any of its predecessors in title. On the contrary, there was indorsed, and still appears upon the margin of page 18 of Volume 8 of the Commissioners' Journal of Stark county, Ohio, upon which is recorded the aforesaid resolution of February 22, 1892, the following words and phrases, to wit: "Transferred to The Canton-Akron Railway Company, July 2, 1902. W. M. Reed, auditor."

After this defendant had purchased said railway and said grant and franchise as aforesaid, and had expended several hundreds of thousands of dollars in so doing, and had made improvements on said railroad, with full knowledge thereof and with full knowledge of all the facts herein set forth, the board of county commis-
66 sioners of Stark county, Ohio, on or about May 3, 1909, amended said resolution of February 22, 1892, so as to permit this defendant to double track part of said electric railroad so built and operated thereunder, between the cities of Canton and Massillon, which said resolution of amendment of May 3, 1909, was entered upon said journal and appears thereon in words and figures, as follows:

"The following resolution was unanimously passed, Commissioners Hay and McDonald voting "aye":

Whereas on the twenty-second day of February, 1892, the board of commissioners of Stark county, Ohio, did by resolution and proper proceedings then authorize and empower William A. Lynch, his heirs and assigns, to lay, build, construct and operate an electric

railway upon the public highway between the cities of Canton and Massillon, on what is known as The Canton-Massillon road, and

Whereas, property owners abutting upon said highway along the portion of the Canton-Massillon road lying between the intersection of the public highways at Reedurban and a point east in said highway known as the Canton-Massillon road, which is the west boundary line of the premises owned by one Frank J. Bordner have dedicated to the public for highway purposes twenty feet on the north side of the said highway, and seventeen feet on the south side of said highway, thus making the said highway between the west
67 line of said Bordner lands and the intersection of the highways at Reedurban one hundred feet in width, and,

Whereas, such dedication of said lands for said highway purposes was made upon condition that The Northern Ohio Traction and Light Company be granted the right and privilege of placing two tracks in said highway, and the center of the devil strip between said tracks to be the center of said highway thus opened to the width of one hundred feet, and,

Whereas, The Northern Ohio Traction and Light Company have in consideration of said dedication and widening of said highway, consented and agreed to double track its said railway along the entire part of said highway so opened to said width of one hundred feet,

Now, therefore, be it resolved, by the board of commissioners of Stark county, Ohio, that permission be given The Northern Ohio Traction and Light Company, its successors and assigns, to place in said highway known as the Canton-Massillon road between the intersection of the cross roads at Reedurban and the west line of the Bordner farm an additional track in said highway to its present track in said highway, and the right to remove the present track therein from its present location to a place in said highway, so that when located said tracks shall be in the center of said highway, that is, the center of the devil strip or space between said tracks shall be the center of said highway so opened and dedicated one
68 hundred feet in width, and that said tracks when placed shall be constructed as per plans attached hereto and made a part hereof, marked Exhibit A, with single line of wooden poles along the center of said tracks with cross arms for necessary wires and shall be placed upon grade as established by the plans attached hereto, and the road bed improved as in said plans provided, and the grading of said highway to be done by The Northern Ohio Traction and Light Company to the satisfaction of the commissioners of Stark county, and to be done forthwith. It being understood that when said tracks are located in the center of said road, the right of franchise by said The Northern Ohio Traction and Light Company in the north side of said road is relinquished and vested in the center of said roadway for the distance covered by said double tracks and in accordance with the plans and specifications.

That the rights herein granted The Northern Ohio Traction and Light Company, its successors and assigns, to lay said additional track upon said highway, and to operate cars thereover and to be-

come a part of its system of railways to be used in connection with its track now upon said highway shall be upon the same terms and conditions as the original grant authorizing the building, constructing and operating of said electric railway, as hereinbefore set forth.

May 3, 1909.

A. L. McDONALD,
AUSTIN A. HAY,
Board of Commissioners of Stark County, Ohio.

Auditor's Journal No. 12."

69 In pursuance of said grant and resolution of May 3, 1909 this defendant constructed said double track railway in accordance with said resolution, to better the service of said electric railroad, and expended large sums of money in so doing, and has ever since that time been operating its cars thereover.

The improvements which were made under and in accordance with said resolution and grant of May 3, 1909, like all the rest of the electric railroad between Canton and Massillon were permanent in their character and to be used as part of this defendant's system of electric roads.

By said resolution of May 3, 1909, said commissioners of Stark county, Ohio, ratified and confirmed said original resolution of February 22, 1892, and the grant thereunder, and this defendant, as the owner of all the rights thereunder. Said resolution of May 3, 1909, has never been rescinded by said board of county commissioners, and is now and ever since its passage — been in full force and effect.

All of the purchases of said railway and said grant and franchise under said resolution of February 22, 1892 made by this defendant and its predecessors in title as hereinbefore set forth, were made in good faith, for a valuable consideration and in reliance upon the validity and perpetuity of said grant and said assignments, and large numbers of the investing public have purchased stock of this de-

70 fendant and of its predecessors in title as hereinbefore set forth, and have purchased the bonds hereinbefore described in good faith for a valuable consideration in reliance upon the validity and perpetuity of said grant and assignments and the acquiescence thereto by the board of county commissioners of Stark county, Ohio.

This defendant is the owner and operator of a continuous line of electric railways between the cities of Cleveland, Akron, Canton, Massillon and Uhrichsville, and said eight miles of road between Canton and the Massillon are an integral part of said electric railway system from Cleveland in Cuyahoga county to Uhrichsville in Tuscarawas county, and said continuous system is used and patronized liberally and generally by the traveling public as both a local and through line among said cities and intermediate points, and this defendant purchased its electric railway from Massillon to Uhrichsville in reliance upon the validity and perpetuity of the grant under and by virtue of said resolution of February 22, 1892, and the afore-

said assignments thereof, and said acquiescence of said board of county commissioners of Stark county, Ohio, and in reliance upon the said railroad between Canton and Massillon being a link in the chain of said continuous electric railway system.

This defendant says that if it is compelled to abandon said railroad between Canton and Massillon, its ability to perform its duties to the public as a common carrier between Cleveland and Uhrichsville as well as between Canton and Massillon will be completely destroyed.

71 Since the erection and operation of said electric road upon the highway between Canton and Massillon, many homes have been bought and built upon lands abutting said highway, in reliance upon the location and continuous operation of said road upon said highway. Upon said highway has also been built and located a college where many children attend, reaching the same by the use of cars of said electric railroad, and said college cannot be reached by any other road; the same being situated about midway between Canton and Massillon, the distance between the public squares of said cities being eight miles.

Said defendant says that said college was built and so located at said place only by reason of said electric railroad being upon said highway, and in reliance upon the validity of said grant for said road, and in reliance upon said five cent fair rate to said students.

This defendant says that by reason of the premises, this defendant has acquired all the rights of said William A. Lynch under said first resolution of February 22, 1892, all of which rights and the rights conferred upon this defendant by said amending resolution of May 3, 1909, this defendant avers are perpetual; and the board of county commissioners has heretofore confirmed and ratified all of the aforesaid transfers and assignments and the right and ownership of this defendant in and to the grant under and by virtue

72 of said resolution of February 22, 1892, and is estopped to deny the validity and perpetuity of said grants and assignments.

This defendant says that said resolution of February 22, 1892, and said amending resolution of May 3, 1909, by the acceptance thereof by this defendant and its predecessors in title, constitute a contract between the board of county commissioners of Stark county Ohio, and this defendant, and that any ouster of this defendant from its use and operation of said electric railroad between Canton and Massillon would be an impairment of the obligation of this defendant's contract, and a taking of this defendant's property without due process of law, and would also be a denial to this defendant of the equal protection of the law, all in violation of the Constitutions of Ohio and of the United States.

By reason of the aforesaid grants and transfers and by reason of the ratification and estoppel of the board of county commissioners of Stark county, Ohio, this defendant has the lawful and perpetual right to operate its interurban electric railroad between the cities of Canton and Massillon.

Wherefore this defendant prays that it may go hence without day and recover its costs from the plaintiff herein.

KLINE, CLEVENGER, BUSS & HOLLIDAY AND
JOHN I. WELTY,
Attorneys for Defendant.

[Duly verified.]

73 *Plaintiff's Motion to Strike Out.*

[Filed May 27, 1913.]

Now comes the relator and plaintiff in this case and moves the court to strike out certain parts and, portions of defendant's answer, to wit:

Second Defense of Defendant's Answer.

First. Relator and plaintiff moves the court to strike out the entire paragraph constituting the entire second defense of defendant's answer and each and every sentence and part thereof.

Fourth Defense of Defendant's Answer.

First. Relator and plaintiff moves the court to strike out of defendant's answer that portion of paragraph four (4) of the fourth defense in defendant's answer and each and every part and sentence thereof beginning with the word "in" in the fourth line of said paragraph and ending with the close of said paragraph, to wit:

"In reliance upon the validity and perpetuity of said grant and said assignment, and in like reliance erected and operated an extensive and valuable interurban road upon the highway running between Canton and Massillon, and for the purpose of raising money to pay for said construction, issued and sold its capital stock to the amount of many thousands of dollars, and on or about May 1, 1900, placed a mortgage upon said railroad, securing its issue of bonds for the sum of eight hundred and fifty thousand dollars ($850,000), which bonds were sold to the general investing public, and are still outstanding, unpaid and uncancelled."

74 Second. Relator and plaintiff moves the court to strike out of defendant's answer that portion of paragraph six (6) of the fourth defense in defendant's answer and each and every part and sentence thereof beginning with the word "and," in the third line of said paragraph, and ending with the close of said paragraph, to wit:

"And to pay the purchase price of said railroad, issued and sold to the investing public its capital stock to the extent of many thousands of dollars, and to pay for said improvements and betterments, on or about March 1, 1902, placed a mortgage upon said railroad, securing its issue of bonds in the sum of two mill-on

dollars ($2,000,000). Of said two million dollars ($2,000,000) of bonds, under the terms of said mortgage, eight hundred and fifty thousand dollars ($850,000) par value were reserved to the mortgage trustee, as security for the payment of said eight hundred and fifty thousand dollars ($850,000) bond issue of said The Canton-Massillon Electric Railway Company, and are still so held; but the remainder of said two million dollar ($2,000,000) bond issue, to wit, one million one hundred and fifty thousand dollars ($1,150,000) par value were sold to large numbers of the investing public, and are still outstanding, unpaid and uncancelled."

Third. Relator and plaintiff moves the court to strike out of defendant's answer that portion of paragraph seven (7) of the fourth defense in defendant's answer and each and every part and sentence thereof beginning with the word "and" in the ninth line
75 of said paragraph and ending with the close of said paragraph, to wit:

"And to pay the purchase price for said road issued and sold to the investing public its capital stock to the amount of many thousands of dollars, and to pay for said improvements and betterments, placed a mortgage upon said road securing its bonds for the sum of two million five hundred thousand dollars ($2,500,000); of which bonds two million dollars ($2,000,000) were issued and sold to large numbers of the investing public and of which one million seventeen thousand dollars ($1,017,000) par value are still outstanding, unpaid and uncancelled."

Fourth. Relator and plaintiff moves the court to strike out of defendant's answer that portion of paragraph nine (9) of the fourth defense in defendant's answer and each and every part and sentence thereof beginning with the word "and" in the third line of said paragraph and ending with the close of said paragraph, to wit:

"And to pay the purchase price of said railway issued and sold to the investing public its capital stock for the amount of many thousands of dollars."

Fifth. Relator and plaintiff moves the court to strike out of defendant's answer that portion of paragraph ten (10) of the fourth defense in defendant's answer and each and every part and sentence thereof beginning with the word "that" in the fourth line
76 of said paragraph and ending with the word "contrary" in the fourteenth line of said paragraph, to wit:

"That the several boards of county commissioners of Stark county, between that time and the filing of the petition herein had full knowledge of all the facts herein stated, and either any said boards of county commissioners, nor any members thereof, nor any residents of Stark county, have ever made any objection to any of the aforesaid assignments of said grant or franchise nor to the operation of said electric railroad thereunder by this defendant or any of its predecessors in title. On the contrary."

Sixth. Relator and plaintiff moves the court to strike out of defendant's answer that portion of paragraph eleven (11) of the fourth defense in defendant's answer and each and every part and sentence thereof beginning with the word "after," in the first line

of said paragraph and ending with the word "forth" in the sixth line of said paragraph, to wit:

"After this defendant had purchased said railway and said grant and franchise as aforesaid, and had expended several hundreds of thousands of dollars in so doing, and had made improvements on said railroad, with full knowledge thereof and with full knowledge thereof and with full knowledge of all the facts herein set forth."

Seventh. Relator and plaintiff moves the court to strike out of defendant's answer paragraph twenty (20), paragraph twenty-two (22), paragraph twenty-three (23), paragraph twenty-four
77 (24), paragraph twenty-five (25), paragraph twenty-six (26) and paragraph twenty-seven (27) in the fourth defense in defendant's answer and each and every part and sentence of said paragraphs, to wit:

"The improvements which were made under and in accordance with said resolution and grant of May 3, 1909, like all the rest of the electric railroad between Canton and Massillon were permanent in their character and to be used as part of this defendant's system of electric roads."

"All of the purchases of said railway and said grant and franchise under said resolution of February 22, 1892, made by this defendant and its predecessors in title as hereinbefore set forth, were made in good faith, for a valuable consideration and in reliance upon the validity and perpetuity of said grant and said assignment, and large numbers of the investing public have purchased stock of this defendant and of its predecessors in title as hereinbefore set forth, and have purchased the bonds hereinbefore described in good faith for a valuable consideration in reliance upon the validity and perpetuity of said grant and assignments and the acquiescence thereto by the board of county commissioners of Stark county."

"This defendant is the owner and operator of a continuous line of electric railways between the cities of Cleveland, Akron, Canton, Massillon and Urichsville, and said eight miles of road between Canton and Massillon are an integral part of said electric railroad system from Cleveland in Cuyahoga county, to Urichsville in Tuscarawas county, and said continuous system is used and patronized liberally and generally by the traveling public as both local and
78 through line among said cities and intermediate points, and this defendant purchased its electric railway from Massillon to Urichsville in reliance upon the validity and perpetuity of the grant under and by virtue of said resolution of February 22, 1892, and the aforesaid assignment thereof, and said acquiescence of said board of county commissioners of Stark county, Ohio, and in reliance upon the said railroad between Canton and Massillon being a link in the chain of said continuous electric railway system."

"This defendant says that if it is compelled to abandon said railroad between Canton and Massillon, its ability to perform its duties to the public as a common carrier between Cleveland and Urichsville as well as between Canton and Massillon will be completely destroyed."

"Since the erection and operation of said electric road upon the

highway between Canton and Massillon, many homes have been bought and built upon lands abutting said highway, in reliance upon the location and continuous operation of said road upon said highway. Upon said highway has also been built and located a college where many children attend, reaching the same by the use of cars of said electric railroad, and said college cannot be reached by any other road, the same being situated about midway between Canton and Massillon, the distance between the public squares of said cities being eight miles."

"Said defendant says that said college was built and so located at said place only by reason of said electric railroad being upon said highway, and in reliance upon the validity of said grant for said road, and in reliance upon said five cents fare rate to said students."

"This defendant says that by reason of the premises this defendant has acquired all the rights of said William A. Lynch
79 under said first resolution — February 22, 1892, all of which rights and the rights conferred upon this defendant by said amending resolution of May 3, 1909, this defendant avers are perpetual; and the board of county commissioners has heretofore confirmed and ratified all of the aforesaid transfers and assignments and the right and ownership of this defendant in and to the grant under and by virtue of said resolution of February 22, 1892, and is estopped to deny the validity and perpetuity of said grants and assignments."

HUBERT C. PONTIUS,
Prosecuting Attorney of Stark County, Ohio;
FRANK N. SWEITZER,
Assistant Prosecuting Attorney of Stark County, Ohio,
Attorneys for Relator.

Journal Entry.

[Entered November 18, 1913.]

THE STATE OF OHIO ex Rel. HUBERT C. PONTIUS, Prosecuting Attorney of Stark County, Ohio, Plaintiff,

vs.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, Defendant.

Motion of Relator to Strike Out Certain Paragraphs in Fourth Defense of Answer in Cause No. 14114 on the General Docket.

It is ordered by the court that the motion be, and the same hereby is reserved for consideration on final hearing of the case.

80 *Reply.*

[Filed December 5, 1913.]

Now comes plaintiff and relator herein and for reply to the answer of the defendant denies each and every statement and allegation in defendant's answer contained except such statements, allegations and averments as admit the averments contained in plaintiff's petition.

HUBERT C. PONTIUS AND
FRANK N. SWEITZER,
Attorneys for Relator and Plaintiff.

[Duly verified.]

80½ *Motion of the Cleveland Trust Company to be Made a Party and for Leave to File Pleadings and Notice of Motion.*

Filed Jun- 10, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

In the Supreme Court of Ohio.

No. 14114.

STATE OF OHIO on the Relation of HUBERT C. PONTIUS, Prosecuting Attorney of Stark County, Ohio, Plaintiff,

vs.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY, a Corporation, Defendant.

Now comes The Cleveland Trust Company, an Ohio corporation, having its principal office in the City of Cleveland, Ohio, and respectfully moves the Court that this applicant be made a party defendant herein, and that it be granted leave to file an answer herein within ten days from the granting of this motion, a copy of said answer being hereto attached and marked "Exhibit A."

R. T. SAWYER AND
G. M. CUMMINGS,
Attorneys for The Cleveland Trust Company.

Service of notice of the foregoing motion by copy and that the same will be set down for hearing on June 10th, 1914, or as soon thereafter as the court can conveniently hear the same, is hereby acknowledged.

H. C. PONTIUS,
Prosecuting Attorney of Stark County, Ohio, Relator Herein.

[Endorsed:] No. 14114. In the Supreme Court of Ohio. State of Ohio on the relation of Hubert C. Pontius, Prosecuting Attorney

of Stark County, Ohio, Plaintiff, vs. The Northern Ohio Traction & Light Company, Defendant. Motion of The Cleveland Trust Company to be made party and for leave to file pleadings and Notice on Motion. Filed Jun- 10, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

81 *Answer of the Defendant The Cleveland Trust Company.*

[Filed June 23, 1914.]

Now comes the defendant, The Cleveland Trust Company, and by leave of court for its answer to the petition in quo warranto, says:

First Defense.

That on the third day of June, 1913, in an action in the Court of Appeals in and for Stark county, Ohio, wherein the State of Ohio on the relation of the then prosecuting attorney for Stark county, Ohio, Charles Krichbaum was plaintiff, and The Northern Ohio Traction and Light Company was defendant, upon the same cause of action alleged in the petition herein and involving the same subject matter as this action, said action in said court being number 928 upon the docket of said court, said Court of Appeals entered a final
82 & 83 judgment on the merits thereof, dismissing said plaintiff's petition, and holding therein that the grant or franchise under the resolution of February 22, 1892, of the county commissioners of Stark county, set forth in the petition herein, is a perpetual grant to William A. Lynch, his successors and assigns, and that said defendant, The Northern Ohio Traction and Light Company, as the owner of said grant has a valid right to operate its electric railroad between the cities of Canton and Massillon, Ohio.

All of the issues so decided in and by said judgment were directly raised and necessarily involved in said action. Said judgment has not since been reversed or modified, and is still a final judgment between the parties hereto upon the cause of action set forth in the petition herein. Said judgment is a bar to this action and by reason of the holdings of said judgment the plaintiff herein is estopped to deny that said grant by and under a resolution adopted by the board of county commissioners of Stark county on February 22, 1892 (which resolution is set forth in the petition herein) is a perpetual and assignable grant, and that the defendant, The Northern Ohio Traction and Light Company, is the true and lawful owner of said grant.

Second Defense.

This defendant, protesting that it should not be required to answer further in this action, if it should be so required, for its second defense, says: That more than five years elapsed prior to the
84 commencement of this action, after the act complained of in the petition herein was done or committed, and that for

more than twenty years prior to the commencement of this action, the defendant, The Northern Ohio Traction and Light Company, and those through and under whom it claims its power and franchises under and by virtue of deeds of assignment hereinafter set forth, have continuously exercised the power or franchise to operate a street railroad between the cities of Canton and Massillon, Ohio, upon the highway commonly known as the Canton-Massillon road, under and by virtue of said resolution of February 22, 1892.

Third Defense.

This defendant, still protesting that it should not be required to answer further in this action, if it should be so required, for its third defense says:

It admits that on or about February 22, 1892, the county commissioners of Stark county, Ohio, passed a resolution as set forth in the petition herein, and that said resolution is recorded on pages 17, 18 and 19 of Volume 8, Commissioners' Journal of Stark county, Ohio; it admits that the defendant, The Northern Ohio Traction and Light Company, is operating an interurban electric railroad under and by virtue of its right as assignee, transferee and successor of William A. Lynch, under the authority of the aforesaid resolution.

It admits that on or about the nineteenth day of February, 1913, the county commissioners of Stark county passed a resolu-
85 tion, which is recorded on pages 323, 324 and 325 of Volume 13, Commissioners' Journal of Stark county, Ohio, and which is set forth in the petition herein.

This defendant, however, denies the statements, allegations and declarations of contention contained in said resolution except as hereinbefore specifically admitted.

It admits that a copy of said last mentioned resolution was delivered to the defendant, The Northern Ohio Traction and Light Company; it admits that said defendant continues to operate and is now operating its electric cars and electric railroad on the public highway, known as the Canton-Massillon road, between the cities of Canton and Massillon in Stark county, Ohio.

Further answering this defendant denies each and every allegation in said petition contained except as herein specifically admitted or qualified.

Fourth Defense.

This defendant still protesting that it should not be required to further answer, if it should be so required, for its fourth defense, re-incorporating herein each and every allegation of its third defense as fully and completely as though specifically repeated herein, says:

That under said resolution duly adopted by the county commissioners of Stark county, Ohio, on or about February 22, 1892, there was granted to William A. Lynch and to such railroad com-

pany as he might cause to be incorporated and his and its
86 assigns, a perpetual right to locate, construct, maintain and operate an electric railroad along either side of the State road running between Canton and Massillon between the line of the Canton Street Railway and the corporation limits of the city of Massillon.

Thereafter under and in accordance with the authority of said resolution of February 22, 1892, said William A. Lynch did cause to be duly incorporated The Canton-Massillon Electric Railway Company (under and by virtue of the laws of the State of Ohio, and sold, transferred and assigned to said The Canton-Massillon Electric Railway Company), its successors and assigns, all his right, title and interest in and to the grant conferred upon him by said resolution of February 22, 1892.

Said The Canton-Massillon Electric Railway Company purchased the rights of said William A. Lynch in and to said grant under said resolution of February 22, 1892, in good faith and for a valuable consideration in reliance upon the validity and perpetuity of said grant and said assignment, and in like reliance erected and operated an extensive and valuable interurban road upon the highway running between Canton and Massillon.

Thereafter said The Canton-Massillon Electric Railway Company, on May 1, 1900, duly executed and delivered a mortgage deed of trust, dated May 1, 1900, to this defendant, The Cleveland Trust Company of Cleveland, Ohio, as trustee, wherein and whereby said The Canton-Massillon Electric Railway Com-
87 pany assigned, transferred and conveyed to this defendant all said railway company's electric railroad between the said cities of Canton and Massillon, and all rights, privileges and franchises held by it under and by virtue of said resolution of the county commissioners of Stark county, Ohio, passed February 22, 1892, to have and to hold the same in trust to secure said railway company's authorized issue of one thousand bonds of the par value of one thousand dollars ($1,000) each, aggregating one million dollars ($1,000,000) in amount; said bonds being dated May 1, 1900, payable to bearer, due twenty-five (25) years from date, bearing interest at the rate of five (5%) per cent. per annum, payable on the first days of May and November of each year; the interest thereon being evidenced by coupons, payable to bearer, attached to said bonds, and the principal and interest of said bonds being payable in gold. Said mortgage deed of trust was duly recorded in Volume 372, page 1, of the records of mortgages of Stark county, Ohio.

Thereafter said The Canton-Massillon Electric Railway Company on March 13, 1902, duly executed and delivered to this defendant, The Cleveland Trust Company, of Cleveland, Ohio, as trustee, its mortgage deed of trust supplementing and modifying the above mentioned mortgage deed of trust by limiting the total amount of authorized issue of bonds to eight hundred and fifty thousand dollars ($850,000) par value.

88 This defendant says that, in accordance with the terms of said mortgage deeds of trust it duly certified eight hundred

and fifty (850) of said bonds of the total par value of eight hundred and fifty thousand dollars ($850,000), all of which were duly issued and sold to the general investing public.

This defendant says that said bonds have been widely distributed in different localities among the investing public. All of said bonds of the total par value of eight hundred and fifty thousand ($850,000) are still outstanding and unpaid, and this defendant, ever since their issuance, has and is still paying the interest thereon as the same matures.

By way of further defense this defendant specifically refers to each and every allegation of the answer filed herein by the defendant, The Northern Ohio Traction and Light Company, and incorporates herein, and makes a part hereof, each and every allegation of said answer as fully and completely as though specifically repeated herein.

This defendant says that the defendant, The Northern Ohio Traction and Light Company, by intermediate conveyances specifically set forth in its answer, acquired all of the properties of said The Canton-Massillon Electric Railway Company, and all of its rights, privileges and franchises held by it under and by virtue of said resolution of the commissioners of Stark county, Ohio, passed February 22, 1892, subject, however, to the incumbrances of the above men-
89 tioned mortgage deeds of trust. This defendant says that said The Canton-Massillon Electric Railway Company, while still in existence, no longer owns any property and no longer operates any railway, and that the principal asset held by this defendant as security for said eight hundred and fifty thousand dollars ($850,000) par value of bonds is the right, privilege and franchise granted by the said resolution of the county commissioners of Stark county, Ohio, passed February 22, 1892.

This defendant says that the rights, privileges and franchises conferred by said resolution of February 22, 1892, are perpetual; that all of said privileges and franchises were acquired by said The Canton-Massillon Electric Railway Company and were owned by it at the time it executed and delivered to this defendant as trustee the above mentioned mortgage deeds of trust that the purchasers of the above mentioned eight hundred and fifty thousand dollars ($850,000) par value of bonds purchased the same in reliance upon the perpetuity of said grant; that the defendant, The Northern Ohio Traction and Light Company, is now the owner of said perpetual rights, privileges and franchises; and that the board of county commissioners, by its conduct, as set forth in the answer of the defendant, The Northern Ohio Traction and Light Company, is estopped to deny the validity and perpetuity of said rights, privileges and franchises, and that the defendant, The Northern Ohio Traction and Light Company, is the owner thereof.

90 This defendant says that said resolution of February 22, 1892, constitutes a contract between the board of county commissioners of Stark county, Ohio, and this defendant, and that any ouster of the defendant, The Northern Ohio Traction and Light Company, from its use and operation of said electric railway between the cities of Canton and Massillon would be an impairment of the obligation of this defendant's contract, would destroy the principal

asset held by this defendant as security for the payment of said bonds, and would be a taking without due process of law of the property of this defendant and of the bondholders, whom it represents, as hereinbefore set forth, and would also be a denial to this defendant and the said bondholders, whom it represents, of the equal protection of the law, all in violation of the constitution of the State of Ohio and of the United States.

Wherefore, this defendant prays that the petition of the relator herein may be dismissed and that judgment be rendered against the plaintiff for the costs in this action.

R. B. SAWYER AND
G. M. CUMMINGS,
Attorneys for Defendant
The Cleveland Trust Company.

[Duly verified.]

91 *Reply to Answer of The Cleveland Trust Company.*

[Filed September 14, 1914.]

Now comes the plaintiff and relator herein and for reply to the answer of the defendant, The Cleveland Trust Company, denies each and every statement and allegation in said defendant's answer contained, except such statements, allegations and averments as admit the averments contained in plaintiff's petition.

HUBERT C. PONTIUS,
Attorney for Relator and Plaintiff.

[Duly verified.]

TRANSCRIPT OF EVIDENCE.

[Filed December 22, 1914.]

Stipulation.

It is stipulated and agreed between counsel for relator and defendant that the three mortgages, being Defendant's Exhibits 2, 3 and 4, the map and resolutions, being Defendant's Exhibit 1, and the record book of the Canton-Massillon Electric Railway Company, being Defendant's Exhibit 5, and the annual statement of the defendant company for the year 1913, and being Relator's Exhibit A, shall all be admitted in evidence, but in the printing of the record of the testimony taken before the special master commissioner that these different exhibits be omitted from the printed record, but to be included in the record of the evidence in the case, and to be con-
92 sidered by the court, the same being omitted from the printed record for the purpose of saving costs in printing same. It is further stipulated between counsel that the pleadings, upon which

this case is to be tried, shall be printed as a part of the record before the master and precede the evidence.

HUBERT C. PONTIUS,
Attorney for Relator.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
By JOHN I. WELTY, *Of Counsel.*

It is mutually stipulated and agreed by and among counsel representing the parties herein, that the defendant, The Northern Ohio Traction and Light Company, is a corporation duly organized under the laws of the State of Ohio, and is engaged in operating an interurban electric railroad in Stark county, Ohio, on a public highway, known as the Canton-Massillon road, and was such corporation and engaged in such business at the time of the filing of the petition in this case.

And with this admission the plaintiff and relator in this case rests its case in chief.

Now comes the defendant and moves that the court render and enter judgment of dismissal against the plaintiff-relator and in favor of the defendant, The Northern Ohio Traction and Light Company.

Defendant offers in evidence docket entries in appearance docket No. 2 of the Circuit Court of Stark county, page 928, and all
93 all of the entries appearing upon that page, in the case of the State of Ohio on relation of Charles Krichbaum, prosecuting attorney of Stark county, Ohio, against The Northern Ohio Traction & Light Company.

(Plaintiff-relator objects on the ground that they are immaterial to this action.)

Master Commissioner: They may be admitted.

(Plaintiff excepts.)

Defendant offers in evidence all the entries and records in the case of Ohio on relation of Charles Krichbaum as prosecuting attorney of Stark county against The Northern Ohio Traction & Light Company, as found in Journal C of the Circuit Court and Court of Appeals, page —, especially the journal entry on pages 261 and 262.

(Plaintiff objects on the ground that it is immaterial and on the ground that the journal entry is not the final order of the court on the demurrer which was interposed to the petition in that case.)

Master Commissioner: It may be admitted; the objection is overruled.

(Plaintiff excepts.)

Defendant offers in evidence the entry and record in the same case and in the same journal and the same courts found on page 266.

(Plaintiff objects on the ground of its being immaterial in this cause of action.)

Master Commissioner: Objection overrueld; it may be admitted.

(Plaintiff excepts.)

94 Defendant offers in evidence Volume 6, page 126, of the Court of Appeals record, being record of the case above re-

ferred to, and also the opinion filed in said case, recorded in Volume 3, page 192.

(Plaintiff objects because it is immaterial.)

Master Commissioner: Objection overruled; it may be admitted.

(Plaintiff excepts.)

Now comes the plaintiff-relator and moves the court that all the evidence of records in Appearance Docket 2, page 928, of the Circuit Court of Stark county, Ohio, and the entries thereunder, and on pages 261 and 262 and 266 of Journal C of the Circuit Court and Court of Appeals, and the record recorded in Volume 6, page 126, and the opinion filed in Volume 3, page 192, be stricken out because the same are immaterial to this action.

(Motion overruled; relator excepts.)

It is stipulated and agreed bteween counsel for all parties in this case that the original appearance docket number 2 of the Circuit and Court of Appeals of Stark county, on page 928, contains the following entries in the case pending in that court and may be read in evidence in substitution for the original entries upon the docket, being the case of the State of Ohio on relation of Charles Krichbaum, prosecuting attorney of Stark county against The Northern Ohio Traction & Light Company. Action in quo warranto.

Counsel for Relator: That stipulation is agreed to by coun-
95 sel for relator subject to the objection and exception that the evidence offered in the same is immaterial.

STATE OF OHIO on Relation of CHARLES KRICHBAUM, Prosecuting Attorney of Stark County,

vs.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

Quo Warranto.

1912, August 13. Petition and precipe filed.

1912, August 13. Summons issued.

1912, August 22. Summons returned indorsed: Received this writ on the thirteenth day of August, A. D. 1912. Pursuant to its command, on August 16, 1912, I served the within named defendant, The Northern Ohio Traction and Light Company, by delivering personally to H. E. Pieren, regular ticket agent for the said defendant in the city of Canton, county of Stark and State of Ohio, a true and certified copy of this writ with all endorsements thereon. The president or other chief officer of the said defendant company not being found in Stark county, Ohio. Adam W. Oberlin, sheriff."

1912, September 25. Motion to petition filed.

1912, October 16. Brief filed.

1912, October 21. Brief filed.

1912, November 1. Motion overruled. C. 240.

1913, February 8. Demurrer filed.

1913, February 8. Special demurrer filed.

1913, February 28. Stenographer ordered to make transcript. C. 256.

96 1913, April 1. Demurrer sustained; not desiring to plead further, judgment for defendant. C. 261.

1913, April 23. Motion to modify decree filed.

1913, May 8. Notice of time of hearing motion filed.

1913, June 3. Former decree of court modified; see entry. C. 266.

1913, June 24. Transcript made for Supreme Court. Recorded Volume 6, page 126.

Opinion filed. Volume 3, 192.

Charles Krichbaum, Attorney for Plaintiff.
Welty & Albaugh, Attorney- for Defendant.

		Defendant's Costs.	
Clerk, Agler	$15.00		
Clerk, Agler, C.....	1.50		
Sheriff Oberlin	.91	Clerk, Agler	$3.50
Stenographer	7.80	Stenographer	7.80
	$25.21		$11.30

1913, 7/18. Cost bill filed. Accrued fee, page 345.

Relator moves that this record just read be stricken from the record.

(Motion overruled; relator excepts.)

Mr. Welty: There is no objection to the form?

Mr. Pontius: Just as to the substance.

Defendant offers in evidence record number 6 of the Circuit Court and Court of Appeals, beginning on page 126, and so much of that page as contains the record of the case of the State of Ohio on relation of Charles Krichbaum, prosecuting attorney of Stark

97 county, Ohio, against The Northern Ohio Traction and Light Company, and also pages 127, 128, 129, 130, 131, 132, 133, 134 and 135.

(Relator objects, not as to counsel reading from record; we admit this is the record, but we object to this as being immaterial in this case.)

(Objection overruled; relator excepts.)

It is stipulated between counsel for all parties that instead of the original record being made a part of this case that counsel for defendant may read into the record the entire part offered, and the same be received, if competent, the same as the original record, and being substituted for the original record.

STATE OF OHIO on Relation of CHARLES KRICHBAUM, Prosecuting Attorney of Stark County, Ohio,
vs.
THE NORTHERN OHIO TRACTION AND LIGHT COMPANY.

Quo Warranto.

Be it remembered, that heretofore, to wit, on the thirteenth day of August, A. D., 1912, there was duly filed in the clerk's office of said Circuit Court a certain petition and precipe in this cause, which petition and precipe read and are in the words and figures following, to wit:

Petition.

STATE OF OHIO,
Stark County, ss:

In Circuit Court.

THE STATE OF OHIO on Relation of CHARLES KRICHBAUM, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
against
THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, Defendant.

98 Now comes Charles Krichbaum, prosecuting attorney of Stark county, Ohio, and by the direction of the board of county commissioners of Stark county, Ohio, gives the court to understand and be informed:

1st. That The Northern Ohio Traction & Light Company is a corporation duly organized under the laws of the State of Ohio, and engaged in operating an interurban electric railroad in Stark county in the State of Ohio, on the public highway known as the Canton-Massillon road, between the cities of Massillon and Canton.

2nd. That the defendant is operating said interurban railway by virtue of the authority and right which it claims to have as assignee or transferee under a certain resolution passed by the commissioners of Stark county, on or about February 22, 1892, and recorded on pages 17, 18 and 19 of Volume 8, Commissioners' Journal of Stark county, and which resolution is in matter and form as follows:

"Resolution for Right of Way for Electric Railway.

Resolved, That the right is hereby granted to William A. Lynch and to such railroad company as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails and in the customary manner with the

necessary poles and wires for an electric railroad. The
99 ties shall not be laid nearer to the center line of said road than nine feet, except where switches are constructed, in which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the traveled portion of said road, or nearer than nine feet from the center of said road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and its bed shall be regraveled so as to restore it to its present state of usefulness. Instead of locating said railroad on one side of the center line as above provided the same may be located along the center line of said road along the whole or any portion thereof, provided, that in such case wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feet wide in fills, and each roadway shall be graveled to a width of ten feet and eight inches in thickness, and put in a condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossings shall be constructed of plank or other suitable materials, at all public highway
100 crossings or intersections, and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially, or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road, shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor changes in location and the plans and methods of grading the highway as the public interests may require. It being understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ten thousand dollars, conditioned for the faithful performance of the conditions enjoined upon them by this resolution. This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5000) five thousand dollars conditioned that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said
101 road. Vote on adopting above resolution: "Clutz, yes; Wearstler, yes; Kreighbaum, yes." The above resolution is entered under the minutes of February 22, 1892, on pages 17, 18

and 19 of Volume No. 8, Commissioners' Journal, Stark county.

On the margin of page 18 in said volume is written with red ink "transferred to Canton-Akron Railway Company July 2, 1902, W. M. Reed, auditor."

3rd. Plaintiff avers and charges that the foregoing resolution under which the defendant is operating its electric interurban railway, is silent as to duration and is indeterminate and exists only so long as the parties thereto mutually agree, that the board of commissioners of Stark county, being the same authority originally granting said resolution under which defendant is operating its electric interurban railway, on or about March 27, 1912, adopted, by a unanimous vote of the members of said board, a resolution of which the following is a copy:

"(March 27, 1912.)

The following resolution was this day presented by Mr. Brissel, and seconded by Mr. McDonald:

"Whereas, an electric railroad is being operated on the public highway between Canton and Massillon by the Northern Ohio Traction and Light Company under the right conferred by a former board of county commissioners by virtue of a resolution passed February 22, 1892, in favor of William A. Lynch and to such railroad company as he might cause to be incorporated, and
102 whereas, the said electric railroad is not being operated under any regular franchise, and whereas, the prosecuting attorney of this county has rendered a written opinion defining the legal status of the said operation of such electric railway, and whereas, in said opinion it is held that in the light of the recent holdings of the Supreme Court of this state, the grant to William A. Lynch is not a perpetual franchise but is subject to be terminated by either of the parties, and is governed by the rules laid down in the 81 Ohio State and the authorities of the Supreme Court of the United States therein cited and by the doctrines of equity applicable to this case both for the protection of the railroad company and the public, and whereas, the fare charged by the said company at the present time is 25 cents per round trip between Canton and Massillon, or 15 cents one way, and no transfers are given for transportation on either of the city lines in Canton and Massillon in connection with the said above mentioned fare, and whereas, this same company operates an electric railway between the cities of Urichsville and New Philadelphia, a distance of ten miles, and the fare charged is only 10 cents one way, and whereas, an electric railway is operated between the cities of Niles and Warren, a distance of six miles, and the fare charged is 5 cents one way, and whereas, this same company operating the electric railways between Canton and Akron give a transfer to all city lines in said city of Akron, but
103 does not do so in the city of Canton, and whereas, the said company is agitating the construction of a one hundred foot boulevard on the said public highway between Canton and Massillon with a double track electric railway in the center of same, and whereas, the said proposition of a boulevard does not enter into

the matter of the amount charged for passage on said railroad between Canton and Massillon and can be taken care of whenever the property owners along said road desire said boulevard, and whereas, it is the opinion of this board that the sum of ten cents for the fare one way between the said cities of Canton and Massillon with the privilege of a transfer on all lines operated by said company in either the cities of Canton or Massillon would be a fair compensation for transporting people the distance of eight miles between the two cities, and that the sum of five cents for the fare one way from Reedurban or any intermediate points to either the city of Canton or city of Massillon with the privilege of a similar transfer as mentioned above would be a fair compensation for transporting the people said distance, therefore, be it resolved, that unless said Northern Ohio Traction and Light Company comply with the *the* above mentioned matters of reduction of amount of fare charged for transporting people between the city of Canton and Massillon and from intermediate points, together with the transfer on the city lines of Canton and Massillon, on or before
the twenty-seventh day of April, 1912, the said grant given
104 to said William A. Lynch on February 22, 1892, to operate
an electric railroad between the said cities of Canton and Massillon is hereby declared terminated and the prosecuting attorney of this county is hereby instructed to take such legal proceedings as may be necessary to have said grant made null and void and the said electric railway removed from said public highway between the said cities of Canton and Massillon, and be it further resolved, that a copy of this resolution be sent to the general manager of said Northern Ohio Traction and Light Company with its offices at Akron, Ohio. Vote on the above resolution being: Stoner, yes; Brissel, yes, and McDonald, yes, the same was declared adopted," and immediately thereafter notified said defendant company of its election to terminate said franchise unless certain conditions in said resolution and notice contained were complied with by the said defendant by the twenty-seventh day of April, 1912, by serving a copy of said resolution upon the Northern Ohio Traction and Light Company.

4th. Plaintiff avers and charges that said defendant failed to comply with the conditions named in the notice and resolution as contained in the foregoing paragraph, by the twenty-seventh day of April, 1912, and that said election to terminate the right of the defendant to operate said interurban electric street railway became operative on said twenty-seventh day of April, 1912; the said defendant having full notice thereof. And plaintiff further
105 avers that defendant has wholly refused and still refuses to
comply with the conditions of said resolution and notice.

5th. That on or about the — day of April, 1912, said board of commissioners reaffirmed its election to terminate said franchise and the right of defendant to operate its interurban electric railway between Massillon and Canton, by adopting by the unanimous vote of the members of said board a resolution of which the following is a copy:

"The following resolution was then presented by Mr. Brissel and seconded by Mr. McDonald:

"Whereas, in the above proposition as submitted to this board on the twenty-sixth day of April, 1912, at 3:40 o'clock p. m. by Mr. Chas. Currie, general manager of The Northern Ohio Traction and Light Company, it is provided that the public highway between the cities of Canton and Massillon be widened from a width of sixty-six feet to a width of one hundred feet and further provided that a franchise be given the said N. O. T. & L. Co. for a double track electric railway to be constructed in the center of the highway, with center pole construction, with the further provision that the said franchise extend for a period of twenty-five years and that the cities of Massillon and Canton extend their franchise to said company so as to expire at same time as said proposed twenty-five year county franchise, and whereas, if said proposition is accepted by the county commissioners of Stark county acting for said county, said company further stipulates certain terms to be incorporated in
106 said proposed twenty-five year franchise, and whereas, the present width of the public highway being sixty-six feet in width is sufficiently wide to accommodate all public travel such as is included within the meaning of the statutes of the State of Ohio relating to public highways, and whereas, any further width is unnecessary to meet the needs of the traveling public of Stark county, and any widening of said public highway would of necessity entail an expenditure of from one hundred and fifty thousand to two hundred thousand dollars to secure said extra thirty-four feet of width and to properly grade and gravel same so as to be a solid road such as the present travelled roadway is, and whereas, the majority of the owners of the land lying along said public highway are opposed to any widening of said road, the following owners having personally communicated said information to this board, viz., Mrs. Helen Carnes, Mrs. Elizabeth Harter, Wm. Grovemiller, John F. Schneider, Leonard Schneider and Enos Stewart, and whereas, it would be a useless and extravagant expenditure of the public funds of this county, and would be doing a wrong to the taxpayers over the entire county for this board, representing Stark county, to pay one cent towards said widening of said public highway for the purpose of giving said N. O. T. & L. Co. a double track on same, which would virtually amount to the establishment of a private right of way for said N. O. T. & L. Co. at the expense of the taxpayers of this
107 county, and whereas, this board had formerly passed a resolution on March 27, 1912, which provided that unless the said company meet the demands of this board in regard to the question of fare, etc., the former resolution passed in February, 1892, whereby said company were given the right to construct and operate said electric railway as at present operated would be annulled and rescinded, and whereas, the above proposition deals with several matters which would properly belong to the matter of securing a franchise on said public highway but does not concern the question of reduction of fares as requested, together with the giving of transfers to city lines, therefore, be it resolved, that the above propo-

sition as submitted by the said Northern Ohio Traction and Light Company be rejected, and be it further resolved, that the submitting of said proposition by said N. O. T. & L. Co. be of no effect and be not considered in connection with the provisions of the resolution passed by this board on March 27, 1912, and be it further resolved that the clerk of this board forward a copy of this resolution to Mr. Chas. Currie, general manager of the Northern Ohio Traction & Light Company, at its principal office in Akron, Ohio. Vote on the above resolution being, Brissel, yes; Mr. Stoner being absent at the time of presentation of said resolution."

The following resolution was presented by Mr. Brissel and seconded by Mr. McDonald:

108 "Whereas, in consideration of the fact that the Northern Ohio Traction & Light Company, which company is operating an electric railway on the public highway between the cities of Canton and Massillon, in submitting the above proposition makes no statement or agreement to the effect that the demands of this board as set forth in the resolution passed March 27, 1912, would be complied with, and whereas, the time in which said demands are to be met was on or before the twenty-seventh day of April, 1912, and whereas, the said time to comply with said resolution of March 27, 1912, will expire before another meeting of this board and it is evident from the language of the said proposition as submitted by the said N. O. T. & L. Co. that the demands of this board will be ignored, therefore, be it resolved, that in the event that said demands are not met by said company on or before the time mentioned in the said resolution of March 27th, 1912, the prosecuting attorney of this county be and he is hereby instructed to immediately proceed to have injunction proceedings filed against said Northern Ohio Traction & Light Company, restraining said company from operating said electric railway on the public highway between the cities of Canton and Massillon or running cars thereon and to further compel said Northern Ohio Traction & Light Company to remove said railway from said public highway, and be it further resolved, that this resolution be contingent upon and in accordance with the conditions of

109 the said resolution passed by this board on March 27th, 1912, and be it further resolved, that the clerk of this board forward a copy of this resolution to Mr. Chas. Krichbaum, prosecuting attorney of Stark county. Vote on above resolution being Brissel—yes, Mr. Stoner being absent at this time."

And it notified the defendant of the aforesaid action of the board by serving upon the defendant immediately thereafter a copy of said last described resolution.

6th. Plaintiff further avers and charged that shortly after the passing of said resolution by the commissioners of Stark county, recorded in Volume 8, Commissioners Journal, Pages 17, 18 and 19, the Canton Massillon Electric Railway, an Ohio corporation, was organized by William A. Lynch under the terms of said grant, for the purpose of operating on said franchise and grant, and did operate for a considerable time under said grant and franchise. And plaintiff further avers and charges that the rights and privileges contained in said

grant of February 22, 1892, and recorded in Volume 8, Commissioners Journal, were personal to William A. Lynch for operation under said grant and franchise and could not be assigned under the terms and conditions of said grant without the consent and authority and additional action of and by the board of commissioners of Stark county, to a succeeding company or companies. And plaintiff further avers and charges that thereafter and while the said Canton-Massillon Electric Company was in full operation and engaged in using said franchise and rights and privileges as granted by the board of commissioners of Stark county, Ohio, the said Canton-Massillon Electric Railway Company undertook to transfer and assign said franchise and rights arising under said grant to the Canton-Akron Railway Company, without the consent of the commissioners of Stark county or without any legislation or action by them in that behalf, that said transfer is void and of no effect, that no right or privileges passed under the same, that the defendant company is without rights in the premises as a succeeding company of said Canton-Akron Railway Company and the said Canton-Massillon Electric Railway Company.

110

7th. Plaintiff avers and charges that the defendant company is without authority and right to operate its interurban electric railway between the cities of Massillon and Canton over said Canton and Massillon road against the aforesaid protest and election and the determination of its rights by the Commissioners of Stark county; but notwithstanding the termination of its rights in the premises by the notice of said board of county commissioners as above recited, it is now and has been ever since the 27th day of April, 1912, usurping and unlawfully exercising and using rights and privileges and franchises in contravention of law, by continuing to operate its electric street railway on the public highway, between said two cities, without complying with the provisions of said resolution and notice.

111

Wherefore, because of the matters and things above set forth, the plaintiff prays the advice of the court in the premises, and that the defendant, to wit, The Northern Ohio Traction & Light Company, be compelled to answer by what warrant it claims to have the use of and to enjoy the rights, privileges and franchises aforesaid in the operation of its said interurban electric railroad between the cities of Canton and Massillon; and that it be ousted from exercising the same, and be compelled to remove its tracks and switches from the said Canton-Massillon road between the corporate limits of Canton and Massillon respectively, and plaintiff further prays that such other relief be granted in the premises as to the court may seem just and proper.

CHARLES KRICHBAUM,
Prosecuting Attorney of Stark County, Ohio.

Precipe.

To the Clerk:

Issue summons for the defendant, The Northern Ohio Traction and Light Company, directed to the sheriff of Stark county, returnable according to law, requiring the said defendant to demur

to or answer the petition in action within thirty days after the return day of said summons, and endorse, "Action in Quo Warranto."

CHARLES KRICHBAUM,
Prosecuting Attorney, Counsel for Plaintiff.

And thereupon on this same day there was duly issued from the clerk's office of said court a certain summons in this cause which summons reads and is in the words and figures following, to wit:

112 *Summons Issued.*

THE STATE OF OHIO,
Stark County, ss:

To the Sheriff of Stark County, Greeting:

You are commanded to notify The Northern Ohio Traction and Light Company that it has been sued by the State of Ohio on the relation of Charles Krichbaum, the prosecuting attorney of Stark county, Ohio, in the Circuit court of Stark county, and that unless it demur or answer the petition within thirty days after the return day of this summons, said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. The sheriff will make due return of this summons on the 26th day of August, A. D. 1912.

Witness my hand and the seal of said court, this 13th day of August, A. D. 1912.

ABRAM W. AGLER, *Clerk.* [SEAL.]

Endorsed: "Summons in Quo Warranto."

And afterwards on the 22nd day of August, A. D. 1912, the sheriff of Stark county duly returned to the celrk's office of said court the foregoing summons issued to said sheriff which return reads and is in the words and figures following, to wit:

Summons Returned.

STATE OF OHIO,
Stark County, ss:

Received this writ on the 13th day of August, A. D. 1912, pursuant to its command on August 16, 1912. I served the within named defendant company, The Northern Ohio Traction & Light Company by delivering personally to H. E. Pieren, regular ticket agent
113 for the said defendant company in the city of Canton, county of Stark and state of Ohio, a true and certified copy of this writ, with all endorsements thereon. The president or other chief officer of the said defendant company not being found in Stark county, Ohio.

ADAM W. OBERLIN, *Sheriff,*
By C. W. KIRK, *Deputy Sheriff.*

And afterwards on the 25th day of September, A. D. 1912, there was duly filed in the clerk's office of said court a certain motion in this cause, which motion reads and is in the words and figures following, to wit:

Motion.

Now comes the defendant, The Northern Ohio Traction & Light Company, and moves the court to require the plaintiff to make his petition more definite and certain and to strike from the petition certain irrelevant matters therein contained, to wit:

1. To make plaintiff's petition more definite and certain in this—on page 6 the following appears "And immediately thereafter notified said defendant company of its election to terminate said franchise unless certain conditions in said resolution and notice contained were complied with by said defendant by the 27th of April, 1912, by serving a copy of said resolution upon the Northern Ohio Traction & Light Company." That said plaintiff be required to set forth the notice claimed to have been given to the defendant, wherein it claims that it elected to terminate said franchise.

2. That on page 7 of the petition reference is made to a resolution presented by Brissel and seconded by McDonald, and
114 the following appears: "Whereas, in the above proposition is submitted to this board on this 26th day of April, 1912, at 3:40 o'clock, p. m., by Mr. Charles Currie, general manager of The Northern Ohio Traction & Light Company," it is provided, etc." Defendant asks that the court require the plaintiff to set forth the proposition referred to as having been submitted by the defendant.

3. To require plaintiff to set forth the date of the passage of the resolution by the commissioners of Stark county, as found on page 9 of the petition, and beginning as follows: "The following resolution was presented by Mr. Brissel and seconded by Mr. McDonald."

4. In the sixth sub-division or complaint of plaintiff, plaintiff avers the following "The said Canton-Massillon Electric Railway Company undertook to transfer and assign said franchise and rights arising under said grant to The Canton-Akron Railway Company without the consent of the commissioners, * * * that said transfer is void and of no effect." That the plaintiff be required to set forth said transfer and the date thereof. To strike from said petition the following matter therein contained which is redundant and irrelevant: 1. The preamble and resolution of the board of county commissioners passed March 27th, 1912, and each and every part thereof. 2. The resolution of the commissioners of Stark county, passed April 26th, 1912, and each and every part thereof.

WELTY & ALBAUGH,
Attorneys for Defendant.

115 And afterwards at a term of the Circuit Court begun and held at the court house in the city of Canton within and for the county of Stark and state of Ohio on the 24th day of September,

A D. 1912, and continued and held on the 1st day of November, A. D. 1912, to wit:

This cause came on to be heard on the motion to make the petition more definite and certain, upon consideration whereof the court overruled the same; to which ruling of the court the defendant excepts. And afterwards on the 8th day of February, A. D. 1913, there was duly filed in the clerk's office of said Court of Appeals a certain demurrer in this cause which demurrer reads and is in the words and figures following, to wit:

Demurrer.

Now comes the defendant, The Northern Ohio Traction & Light Company and demurs to the petition of the plaintiff filed herein for the following reasons:

1. That the petition does not state facts sufficient to constitute a cause of action against the defendant.
2. That the petition does not state facts sufficient to entitle the plaintiff to the relief prayed for.
3. That this court has no jurisdiction to hear and determine this action or to grant the relief prayed for herein.
4. That this action is barred by the statute of limitations.
5. That the plaintiff has no legal capacity to try or to bring this action.

WELTY & ALBAUGH,
Attorneys for Defendant.

And thereupon this same day there was duly filed in the clerk's office of said court a certain special demurrer in this cause,
116 which special demurrer reads and is in the words and figures following, to wit:

Special Demurrer.

Now comes the defendant, The Northern Ohio Traction & Light Company and for its special demurrer to the petition of the plaintiff filed herein says:

1. That this action was not brought within the time limited for the commencement of same.
2. That this action is barred by the laws of Ohio and was not commenced within the time prescribed and provided for therein and is therefore barred by the statute of limitations placed upon such actions.

WELTY & ALBAUGH,
Attorneys for Defendant.

And afterwards at a term of the Court of Appeals begun and held at the court house in the city of Canton within and for the city of Canton within and for the county of Stark and State of Ohio on the 11th day of February, A. D. 1913 and continued and held on the 28th day of February, A. D. 1913, to wit:

C-256.

At the request of the prosecuting attorney the stenographer is hereby ordered to furnish the prosecuting attorney with 4 transcripts of the court's opinion in the above entitled cause. And it further appearing that pursuant to such order the stenographer has furnished the prosecuting attorney with 4 transcripts of the opinion in the above entitled cause, and the entry for the same is hereby approved.

HUBERT C. PONTIUS,
Prosecuting Attorney.

117 And afterwards at this same term of court continued and held on the 1st day of April, A. D. 1913, to wit:

C-261.

Leave having been granted to the defendant, The Northern Ohio Traction & Light Company, to file a special and general demurrer to the plaintiff's petition and the same having been filed, thereupon this cause came on for hearing upon said demurrer and upon consideration thereof the court find from the facts stated in plaintiff's petition that in 1892 the county commissioners of Stark county, Ohio, adopted and passed the resoution set forth in plaintiff's petition, thereby granting to William A. Lynch and to such railroad company as he may cause to be incorporated the right to locate, construct, maintain and operate an electric railroad as in said resolution provided and that in accordance with said resolution said William A. Lynch shortly after the passage of said resolution organized and had incorporated The Canton-Massillon Electric Railway Company, an Ohio corporation, and that the railroad was built in accordance with said resolution, franchise and grant and has been continuously operated by said William A. Lynch, The Canton-Massillon Electric Railway Company, and its successors, including The Northern Ohio Traction & Light Company, the present owner.

The court further find from the facts stated in the plaintiff's petition that there is no claim made by the plaintiff that said
118 resolution has in any manner been violated by said William A. Lynch, The Canton-Massillon Electric Railway Company, nor the defendant, nor any company operating under said resolution.

The court further find that said resolution, known as the Lynch Resolution of 1892, did not provide any date for the expiration or termination thereof, and the court find that said resolution, grant and franchise thereunder, by the terms of said resolution, is perpetual.

The court find also from the facts stated in the petition that the resolutions adopted by the board of county commissioners as set forth in said petition do not in express and unqualified terms repeal said Lynch Resolution and that because of such findings of fact, the court, applying the law, find:

1. That the special demurrer of the defendant is overruled on both grounds and to which the defendant excepts.

2. The court coming to consider the general demurrer, find that the first, second and fifth grounds of said general demurrer should be and hereby are sustained and overruled as to the third and fourth grounds.

To the sustaining of the first, second and fifth grounds of said general demurrer the plaintiff excepts, and to the overruling of the third and fourth grounds of said general demurrer the defendant excepts.

The plaintiff not desiring to further plead by way of amendment to the petition it is ordered, adjudged and decreed that said petition be dismissed at the costs of the plaintiff, and to all of
119 which the plaintiff excepts, and that judgment be entered herein against the plaintiff for the costs, taxed at $ —, and for which execution is awarded.

And afterwards on the 23rd day of April, A. D. 1913, there was duly filed in the clerk's office of said court a certain motion in this cause, which motion reads and is in the words and figures following, to wit:

Motion.

Now comes the plaintiff and moves the court for an order to modify the journal entry now on file in this cause, so that said journal entry will read as follows:

STATE OF OHIO,
Stark County, ss:

In the Court of Appeals.

THE STATE OF OHIO on Relation of CHARLES KRICHBAUM, Prosecuting Attorney of Stark County, Ohio, Plaintiff,
vs.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendant.

Journal Entry.

Case No. 928.

Leave having been granted to the defendant, The Northern Ohio Traction & Light Company, to file a special and general demurrer to the plaintiff's petition, thereupon this cause came on for hearing upon said demurrers and upon consideration thereof the court find:

1. That the special demurrer is overruled on both grounds, and to all of which the defendant excepts.

2. The court coming to consider the general demurrer find that the first, second and fifth grounds of said general demurrer should be and hereby are sustained, and overruled as to the third and fourth grounds of said general demurrer.

To the sustaining of the first, second and fifth grounds of said general demurrer the plaintiff excepts, and to the overruling
120 of the third and fourth grounds of said demurrer the defendant excepts.

The plaintiff not desiring to plead further by way of amendment to the petition it is ordered that said petition be dismissed at the costs of the plaintiff, and to all of which the plaintiff excepts, for the following reasons:

1. The journal entry now on file contains a finding of facts.
2. Counsel for plaintiff did not have the opportunity to make objections to the journal entry now on file.
3. The words and figures set forth in this motion as plaintiff seeks to have the journal entry read is the proper journal entry to file in this cause.

HUBERT C. PONTIUS AND
FRANK N. SWEITZER,
Attorneys for Plaintiff.

And afterwards at this same term of court continued and held on the 3rd day of June, A. D. 1913, to wit:

C. 266.

This cause coming on to be heard upon the motion of the plaintiff to modify the journal entry heretofore filed in this cause upon the ruling of the court upon the general and special demurrer of the defendant filed to the petition was submitted to the court, on consideration whereof the court grants said motion and orders said journal entry to be modified so as to read as follows, to wit: Leave having been granted to the defendant, The Northern Ohio Traction & Light Company to file a special and general demurrer to the plaintiff's petition, thereupon this cause came on for hearing upon said demurrers and upon consideration thereof the court
121 find:

1. That the special demurrer is overruled on both grounds, to all of which the defendant excepts.

2. The court coming to consider the general demurrer find that the first, second and fifth grounds of said general demurrer should be and hereby are sustained, and overruled as to the third and fourth grounds.

To the sustaining of the first, second and fifth grounds of the general demurrer the plaintiff excepts, and to the overruling of the third and fourth grounds of the said demurrer the defendant excepts.

The plaintiff not desiring to plead by way of amendment to the petition, it is ordered that said petition be dismissed at the costs of the plaintiff, and to all of which plaintiff excepts, and that judgment be entered herein against the plaintiff for the costs taxed herein at — dollars, for which execution is awarded.

Attest:

ABRAM W. AGLER, *Clerk.*"

Now comes the relator and moves the court to strike out the record just read, because it is irrelevant and incompetent; there is no objection because of the record having been read by counsel nor that this is substituted for the original record.

(Motion overruled; relator excepts.)

Defendant offers in evidence pages 17, 18 and 19 of the Commissioners Journal of Stark county, Number 8, which reads as follows:

122 *"Resolution for Right of Way for Electric Railway.*

Resolved, that the right is hereby granted to William A. Lynch and to such railroad corporation as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails in the customary manner with the necessary poles and wires for an electric railroad. The ties shall not be laid nearer to the center line of said road than nine feet, except where switches are constructed, at which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the traveled portion of said road, or nearer than nine feet from the center of the road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and its bed shall be re-gravelled so as to restore it to its present state of usefulness, instead of locating said railroad on one side of the center line as above provided, the same may be located, along the center line of said road, along the whole or any portion thereof provided that in such case
123 wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feed wide on fills, and each roadway shall be graveled to a width of ten feet and eight inches in thickness and put in condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossings shall be constructed of plank or other suitable materials, at all public highway crossings or intersections and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially, or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor

changes in location and the plans and methods of grading the highway as the public interests may require. It being understood and agreed that said Wm. A. Lynch or the railroad company, before commencing any part of said work shall enter into a bond
124 in the sum of ten thousand dollars for the faithful performance of the conditions enjoined upon them by this resolution. This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5000) five thousand dollars conditional that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said road. Vote on adopting above resolution, Clutz—yes; Wearstler—yes; Kreighbaum—yes."

On the margin of page 18 appears the following in red ink:

"Transferred to Canton-Akron Ry. Co. July 2nd, 1902, A. D. W. M. Reed, Auditor."

Defendant offers in evidence resolution of the commissioners of Stark county, Ohio, as appears in the Commissioners Journal Number 12, pages 108 and 109, and which resolution reads as follows:

"The following resolution was unanimously passed, Commissioners Hay and McDonald voting "Aye".

Whereas, on the 22nd day of February, 1892, the board of commissioners of Stark county, Ohio, did by resolution and proper proceedings then authorize and empower William A. Lynch, his heirs and assigns, to lay, build, construct and operate an
125 electric railroad upon the public highway between the cities of Canton and Massillon, on what is known as the Canton-Massillon road, and,

Whereas, Said electric street railway has been built and is being operated under said grant so made, and all rights thereunder are now owned and controlled by The Northern Ohio Traction & Light Company, an incorporated company under the laws of Ohio, and,

Whereas, property owners abutting upon said highway along that portion of the Canton-Massillon road lying between the intersection of the public highways at Reedurban and a point east *in* said highway known as the Canton-Massillon road, which is the west boundary line of the premises owned by one Frank J. Bordner, have dedicated to the public for highway purposes twenty feet on the north side of the said highway and seventeen feet on the south side of said highway, thus making said highway between the west line of said Bordner lands and the intersection of the highways at Reedurban one hundred feet in width, and,

Whereas, Such dedication of said lands for said highway purposes was made upon condition that The Northern Ohio Traction & Light Company be granted the right and privilege of placing two tracks in said highway, and the center of the devil strip between said

tracks to be the center of said highway thus opened to the width of one hundred feet, and,

126 Whereas, The Northern Ohio Traction & Light Company have in consideration of said dedication and widening of said highway, consented and agreed to double track its said railway along the entire part of said highway so opened to said width of one hundred feet,

Now, therefore, be it resolved, by the board of commissioners of Stark county, Ohio, that permission be given The Northern Ohio Traction & Light Company, its successors and assigns, to place in said highway known as the Canton-Massillon road between the intersection of the cross roads at Reedurban and the west line of the Bordner farm and additional track in said highway to its present track in said highway, and the right to remove the present track therein from its present location to a place in said highway so that when located said tracks shall be in the center of said highway, that is, the center of the devil strip or space between said tracks shall be the center of said highway so opened and dedicated one hundred feet in width, and that said tracks when placed shall be constructed as per plan attached hereto and made a part hereof, marked Exhibit A, with single line of wooden poles in center of said tracks with cross arms for necessary wires and shall be placed upon the grade as established by the plans attached hereto, and the roadbed improved as in said plans provided, and the grading of said highway to be done by The Northern Ohio Traction & Light Company

127 to the satisfaction of the commissioners of Stark county, and to be done forthwith. It being understood that when said tracks are located in the center of said road, the right of franchise of said The Northern Ohio Traction & Light Company in the north side of said road is relinquished and vested in the center of said roadway for the distance covered by said double tracks and in accordance with the plans and specifications.

That the rights herein granted The Northern Ohio Traction & Light Company, its successors and assigns, to lay said additional track upon said highway, and to operate cars thereover and to become a part of its system of railways to be used in connection with its track now upon said highway shall be upon the same terms and conditions as the original grant authorizing the building, constructing and operating of said electric railway, as hereinbefore set forth.

May 3rd, 1909.

A. L. McDONALD,
AUSTIN A. HAY,
Board of Commissioners of Stark County, Ohio.

And the hour of adjournment having arrived the further hearing of this cause was adjourned to one o'clock, p. m. of the same day and date.

128 RALPH L. OBERLIN, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welty:

Q. Mr. Oberlin you are at present the county auditor?
A. Yes, sir.
Q. Of Stark county?
A. Yes, sir.
Q. You were formerly deputy county auditor were you not?
A. Yes, sir.
Q. When did you take the office of auditor?
A. Last October the 20th.
Q. 1913?
A. 1913.
Q. Before that time how long had you served as deputy auditor?
A. About nine years.
Q. As deputy auditor were you clerk of the board of commissioners?
A. For several years, yes, sir.
Q. In 1909 what position, if any, did you hold in the auditor's office?
A. I was acting as commissioners' clerk.
Q. That is the county commissioners?
A. Yes, sir, county commissioners.
Q. Mr. Oberlin, you may state what book this is?
A. This is a record of Commissioners' Proceedings, Volume No. 12 of Stark county.
Q. That is in your custody as auditor?
A. It was at that time.
Q. You may look at page- 108 and 109, resolution passed by the commissioners May 3rd, 1909?
A. Yes, sir.
Q. You were the clerk at that time?
A. Yes, sir.
Q. And made up that record?
A. Yes, sir, it was made under my instructions.

129 Q. You may look at the paper that I now show you marked for identification, "Defendant's Exhibit 1" and state what that is?
A. That is the original resolution signed by the commissioners at that time, together with the plat which was made a part of the resolution.
Q. Is this the resolution and plat that was adopted there by the commissioners?
A. Yes, sir.
Q. And which you recorded the resolution on pages 108 and 109 of this record?
A. It is.

Defendant offers in evidence original resolution and plat marked "Defendant's Exhibit 1."

(Relator objects; objection overruled; relator excepts.)

Q. Is this the plat that is referred to as "Exhibit A" in the resolution?

A. Yes, sir.

(Relator objects to the question and moves that the answer be stricken out; objection and motion overruled; relator excepts.)

Q. Now Mr. Oberlin have you got the record of the resolutions passed by the board of commissioners of Stark county, Ohio, in 1912?

A. I have a record of the commissioners' journal.

Q. You remember these resolutions concerning the Canton-Massillon franchises?

A. Yes, sir.

Q. You have a recollection of some of them?

A. Yes, sir.

Q. This is Journal Number 13 of the commissioners, is that one of the records of the commissioners of Stark county?

A. Yes, sir, it is.

130 Q. Over what period does that record extend?

A. From September 1st, 1911, to February 27, 1914.

Q. Turn to page 120, we find there a resolution presented by Mr. Brissel and seconded by Mr. McDonald concerning the controversy between the Canton-Massillon Railway Company and the Northern Ohio Traction & Light Company, what is the date of that?

A. March 27, 1912.

Q. That is the time the resolution was passed?

A. Yes, sir.

Q. Have you the original of that resolution?

A. I might have it, I don't know.

Q. Is this a correct copy of it in their record, in their minutes?

A. It is a correct copy which has been signed by them as part of their minutes.

Q. The entire resolution was carried into the minutes?

A. Yes, sir.

Defendant offers in evidence minutes found on page 120 of Journal Number 13 of the Commissioners of Stark county.

(Relator objects; objection overruled; relator excepts.)

It is stipulated between all the parties to this case that this resolution may be read by the witness into the record and used the same as if the original record or original resolution were introduced, and as a substitute for the original resolution; subject to the objection of the relator to the resolution as incompetent, irrelevant and immaterial.

Q. You may read that?

A. Under date of March 27th, 1912: "The following resolution was this day presented by Mr. Brissel, and second- by Mr.

131 McDonald:

Whereas, an electric railroad is being operated on the public highway between Canton and Massillon by the Northern Ohio Traction and Light Company under the right conferred by a former board of county commissioners by virtue of a resolution passed February 22, 1892, in favor of William A. Lynch and to such railroad company as he might cause to be incorporated, and,

Whereas, the said electric railroad is not being operated under any regular franchise, and,

Whereas, the prosecuting attorney of this county has rendered a written opinion defining the legal status of the said operation of such electric railway, and,

Whereas, in said opinion it is held that in the light of the recent holding of the Supreme Court of this state, the grant to William A. Lynch is not a perpetual franchise but is subject to be terminated by either of the parties, and is governed by the rules laid down in the 81st Ohio State and the authorities of the Supreme Court of the United States therein cited and by the doctrine of equity applicable to this case both for the protection of the railroad company and the public, and,

Whereas, the fare charged by the said company at the present time is 25c. per round trip between Canton and Massillon or 15c. one way and no transfers are given for transportation on
132 either of the city lines in Canton and Massillon in connection with said above mentioned fare, and,

Whereas, this same company operates an electric railway between the cities of Urichsville and New Philadelphia, a distance of ten miles and the fare charged is only 10c. one way, and,

Whereas, an electric railway is operated between the cities of Niles and Warren, a distance of six miles, and the fare charged is 5c. one way, and,

Whereas, this same company operating the electric railway between Canton and Akron gives a transfer to all city lines in said city of Akron, but does not do so in the city of Canton, and,

Whereas, the said company is agitating the construction of a one hundred foot boulevard on the said public highway between Canton and Massillon with a double track electric railway in the center of same, and,

Whereas, the said proposition of a boulevard does not enter into the matter of the amount charged for passage on said railroad between Canton and Massillon and can be taken care of whenever the property owners along said road desire said boulevard, and,

Whereas, it is the opinion of this board that the sum of ten cents fare one way between the said cities of Canton and Massillon with the privilege of a transfer on all lines operated by said company in either the cities of Canton or Massillon would be a fair compensation for transporting people the distance of eight miles between
133 the two cities, and that the sum of five cents for the fare one way from Reedurban or any intermediate points to either the city of Canton or city of Massillon with the privilege of a similar transfer as mentioned above would be a fair compensation for transporting the people said distance, therefore,

Be it resolved, That unless said Northern Ohio Traction and Light Company comply with the above mentioned matters of reduction of amount of fare charged for transporting people between the cities of Canton and Massillon and from intermediate points, together with the transfer on the city lines of Canton and Massillon, on or before the 27th day of April, 1912, the said grant given to said William A. Lynch on February 22, 1892, to operate an electric railroad between the said cities of Canton and Massillon, is hereby declared terminated and the prosecuting attorney of this county is hereby instructed to take such legal proceedings as may be necessary to have said grant made null and void and the said electric railway removed from said public highway between the said cities of Canton and Massillon, and,

Be it further resolved, That a copy of this resolution be sent to the general manager of said Northern Ohio Traction and Light Company with its offices at Akron, Ohio.

Vote on the above resolution being Stoner—yes, Brissell—yes, and McDonald—yes, the same was declared adopted.

134 Now comes the relator and moves that the resolution be stricken out on the ground that it is incompetent, irrelevant and immaterial; but no objection being made to the manner in which the resolution is being introduced.

(Motion overruled; relator excepts.)

Q. Now turn to page 140 of volume 13, do you find a resolution passed there by the county commissioners and recorded on that page and the next concerning the controversy between the Northern Ohio Traction & Light Company and the county concerning this matter of the franchises?

A. I do.

Q. Was that resolution adopted by the board?

A. Yes, sir, it was.

Defendant offers in evidence resolution found on page 140 of Volume 13 of the Commissioners Journal.

(Relator objects; objection overruled; relator excepts.)

It is stipulated by counsel for all parties concerned in this controversy that the resolution of April 26th, 1912, as found in the Commissioners Journal, Volume 13, pages 140 and 141, shall be read into the record by the witness and the same be used in lieu of the record itself and the original resolution, and as a substitute therefor, subject to the objection of relator to its competency, relevancy and materiality in this cause, but not subject to the form in which the resolution is in the record.

Q. Now you may read that resolution Mr. Oberlin?

135 (Relator objects because the resolution is immaterial.)

A. "The following resolution was presented by Mr. Brissel, and seconded by Mr. McDonald:

Whereas, in consideration of the fact that the Northern Ohio Traction & Light Company, which company is operating an electric rail-

way on the public highway between the cities of Canton and Massillon, in submitting the above proposition makes no statement or agreement to the effect that the demands of this board as set forth in the resolution passed March 27th, 1912, would be complied with, and,

Whereas, the time in which said demands are to be met was on or before the 27th day of April, 1912, and,

Whereas, the said time to comply with said resolution of March 27, 1912, will expire before another meeting of this board and it is evident from the language of the said proposition as submitted by the said N. O. T. & L. Co. that the demands of this board will be ignored,

Therefore, be it resolved, That in the event that demands are not met by the said company on or before the time mentioned in the said resolution of March 27th, 1912, the prosecuting attorney of this county be and he is hereby instructed to immediately proceed to have injunction proceedings filed against said Northern Ohio Traction & Light Company restraining said company from operating said
136 electric railway on the public highway between the cities of Canton and Massillon or running cars thereon and to further compel said Northern Ohio Traction & Light Company to remove said electric railway from said public highway, and,

Be it further resolved, That this resolution be contingent upon and in accordance with the conditions of the said resolution passed by this board on March 27th, 1912, and

Be it further resolved, That the clerk of this board forward a copy of this resolution to Mr. Chas. Krichbaum, prosecuting attorney of Stark county.

Vote on above resolution being Brissel—Yes, McDonald—Yes, Mr. Stoner being absent at this time."

Now comes the relator and moves that this resolution be stricken from the record on the ground that it is immaterial, incompetent and irrelevant, but not on any other ground.

(Motion overruled; relator excepts.)

Q. Is that resolution signed?

A. That was really signed; at the end of each day they sign the journal for that day's business.

Q. By whom?

A. That is signed by C. H. Stoner, George Brissel and A. L. McDonald, commissioners of Stark county.

Q. They were the commissioners of Stark county at that time?

A. They were.

Q. Mr. Oberlin, do you know the distance from the public square in Canton to the public square in Massillon?

137 (Relator objects; objection overruled.)

A. Not definite, no, only by reputation.

Q. How?

A. Only by common reputation.

Q. Do you know the distance between the city lines of Massillon

and Canton on the Massillon road, the east line of Massillon and the west line of Canton?

A. I don't know, exactly.

That is all.

The defendant offers the following stipulation.

It is hereby mutually stipulated and agreed by and between counsel representing all the parties herein that for the purpose of this suit the following statement of facts is true and correct, reserving to each party, however, the right to object to the admission of the evidence, or any part thereof in this cause on the ground that the same is immaterial or irrelevant to the issues of this case.

It is agreed that the following is a statement of facts relating to transfers of title and franchises and execution and delivering of mortgages:

1. In the year 1892, after the passage of the resolution of the county commissioners of Stark county, on or about February 22nd, 1892, and the acceptance thereof by William A. Lynch, said William A. Lynch did cause to be duly incorporated under and by virtue of the laws of the state of Ohio, a corporation, The Canton-Massillon Electric Railway Company, duly authorized under its charter to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon.

2. Thereafter said William A. Lynch by deed dated April
138 25th, 1892, duly recorded in Volume 295, page 322 of the records of deeds of Stark county, Ohio, did assign, transfer and set over unto said The Canton-Massillon Electric Railway Company, its successors and assigns, all rights conferred upon him by the above mentioned resolution of the county commissioners of Stark county, Ohio, passed February 22, 1892. Thereafter the Canton-Massillon Electric Railway Company caused to be constructed an interurban electric railroad between the cities of Canton and Massillon along the route described in the above mentioned resolution of the county commissioners of Stark county, Ohio, passed February 22nd, 1892.

3. Thereafter said The Canton-Massillon Electric Railway Company by deed dated June 17th, 1902, recorded in Volume 405, page 397 of the Records of Deeds of Stark county, Ohio, duly assigned, transferred and set over to the Canton-Akron Railway Company, its successors and assigns, all its right, title and interest in and to said Electric Railroad between the cities of Canton and Massillon, and all rights, privileges and franchises held by it under and by virtue of said resolution of the county commissioners of Stark county, Ohio, passed February 22nd, 1892.

The said, The Canton-Akron Railway Company was a corporation duly organized under the laws of the state of Ohio, authorized to operate the said electric railroad between the cities of Canton
139 and Massillon, and other electric railroads between other points.

4. Thereafter by deed dated October 10th, 1906, duly filed for record October 16th, 1906, and recorded in Volume 461, page 19 of the Record of Deeds of Stark county, Ohio, said The Canton-Akron

Railway Company assigned and transferred all its right, title and interest in and to said electric railroad extending between the cities of Canton and Massillon, together with all rights, privileges and franchises held by it under and by virtue of said resolutions of the county commissioners of Stark county, Ohio, passed February 22nd, 1892, to the Canton-Akron Consolidated Railway Company, its successors and assigns.

The said The Canton-Akron Consolidated Railway Company was a corporation duly organized under and by virtue of the laws of the State of Ohio and authorized to operate the said railroad between the cities of Canton and Massillon and other electric railroads.

5. Thereafter said The Canton-Akron Consolidated Railway Company by deed dated October 13th, 1906, and recorded in volume 461, page 1, of the records of deeds of Stark county, Ohio, duly assigned, transferred and set over to the defendant herein, The Northern Ohio Traction & Light Company, its successors and assigns, all its right, title and interest in and to such electric railroad extending between the cities of Canton and Massillon, and all rights,
140 privileges and franchises held by it under and by virtue of the said resolution of the county commissioners of Stark county, Ohio, passed February 22, 1892.

Said, The Northern Ohio Traction & Light Company has never transferred or assigned said property rights, privileges and franchises claimed by it under and by reason of the above mentioned transfers and assignments.

6. That since its construction by said The Canton-Massillon Electric Railway Company, under said resolution of the county commissioners of Stark county, passed February 22, 1892, said electric railroad extending between the cities of Canton and Massillon has been continuously operated up to the present time by the above mentioned electric railway companies during their respective periods of ownership thereof.

7. Said, The Canton-Massillon Electric Railway Company duly executed and delivered a mortgage deed of trust, dated May 1st, 1900, to The Cleveland Trust Company, trustee, of Cleveland, Ohio covering all its properties and rights, privileges and franchises, which mortgage deed of trust was recorded in volume 372, page 1, of the Records of Mortgages of Stark county, Ohio, and a copy of which mortgage deed of trust is marked for identification "Defendant's Exhibit 2."

Thereafter said The Canton-Akron Railway Company duly executed and delivered its mortgage deed of trust to the
141 Knickerbocker Trust Company, trustee, of New York City, dated March 1, 1902, upon all of said company's properties and rights, privileges and franchises, included among which properties is the electric railroad between the cities of Canton and Massillon, and included among which rights, privileges and franchises were the rights, privileges and franchises held by it under and by virtue of said resolution of the commissioners of Stark county, Ohio, passed February 22, 1892; the said mortgage deed of trust was recorded in volume 392, page 341, of the records of mortgages of Stark

county, Ohio, and a full and complete copy of the same is marked for identification "Defendant's Exhibit 3."

Thereafter the said The Canton-Akron Consolidated Railway Company duly executed and delivered its mortgage deed of trust dated October 12, 1906, to The Citizens Savings & Trust Company of Cleveland, Ohio, and S. Reed Anthony of Boston, Massachusetts, trustees, upon all of the said Company's properties and franchises, among which properties was the said electric railroad extending between said cities of Canton and Massillon, and among which franchises were the rights, privileges and franchises held by it under and by virtue of said resolution of the county commissioners of Stark county, Ohio, passed February 22, 1892. The said mortgage deed of trust dated October 12, 1906, was duly recorded in volume 446, page 34 of the records of mortgages of Stark county, and a full and complete copy thereof is marked for identification "Defendant's Exhibit 4."

142 It is further stipulated and agreed that the said printed copies of said mortgage deeds of trust marked respectively "Defendant's Exhibits 2, 3 and 4" may be offered and received in evidence in substitution for the originals of the same as fully and completely as though the originals themselves were so offered and received, reserving, however, to the relator his objection to the admission thereof upon the ground that the same are not material or relevant to the issues of this case.

The defendant now offers in evidence a printed paper consisting of 23 printed pages, entitled on the outside page thereof "The Canton-Massillon Electric Railway Company to The Cleveland Trust Company, Trustee. Mortgage Deed of Trust. Dated May 1, 1900" and endorsed on the front page thereof by the stenographer for identification "Defendant's Exhibit 2."

(Relator objects on the ground that the same is immaterial and irrelevant to this cause. But no objection is made as to the form or because it is a copy other than the original; objection overruled; relator excepts.)

Defendant now offers in evidence "Defendant's Exhibit 3," a printed mortgage deed of trust consisting of 31 printed pages, upon the first cover of which appears the words "The Canton-Akron Railway Company to the Knickerbocker Trust Company of New York. First Mortgage. Dated March 1, 1902. Securing an issue of five per cent. twenty year gold bonds.

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Authorized issue	$2,000,000
Issued on execution of mortgage	750,000
Reserved to retire bonds of The Canton-Massillon Electric Railway Company	850,000
Reserved for future improvements	400,000

Interest payable March 1 and September 1 at office of trustee. These bonds are not subject to call."

Which mortgage deed has been marked for identification on first page thereof by the stenographer, "Defendant's Exhibit 3."

(Relator objects because it is immaterial and irrelevant but not on the ground that it is a copy of the original; objection overruled; relator excepts.)

The defendant now offers in evidence "Defendant's Exhibit 4" being the printed mortgage deed of trust consisting of 49 printed pages, upon the front cover of which appears the following:

"The Canton-Akron Consolidated Railway Company to The Citizens Savings & Trust Company of Cleveland, Ohio, and S. Reed Anthony, trustees. Consolidated mortgage. Dated October 12, 1906. Securing an issue of consolidated 5 per cent. gold bonds due January 1, 1933. Authorized issue, $2,500,000. Issued on execution of mortgage, $1,360,000; reserved to retire outstanding mortgage bonds, $500,000; reserved for future additions, improvements, etc., $640,000; interest payable January 1 and July 1, at the office of The Citizens Savings & Trust Company."

144 Which mortgage deed of trust has been marked for identification by the stenographer on the first page thereof "Defendant's Exhibit 4."

(Relator objects because it is immaterial and irrelevant, but no objection is made as to its being a copy; objection overruled; relator excepts.)

(Relator moves the court that "Defendant's Exhibits 2, 3, and 4" be stricken from the record on the ground that they are immaterial and irrelevant; motion overruled; relator excepts.)

The defendant now offers in evidence the record of a mortgage deed of trust contained in volume 402 at pages 95, 96 and 97 of the Stark county mortgage deed records.

It is mutually stipulated by and among counsel representing all parties herein that the original record of said mortgage may be read into evidence and received as a substitute for the original record itself as fully and completely as though the original record were offered, subject to the objection of the relator to the admission thereof on the ground that the same is immaterial and irrelevant to the issues of this case, no objection being made, however, as to form or as to the evidence being a copy.

"The Canton-Akron Railway Company to the Knickerbocker Trust Company. This supplemental evidentiary made this eighth day of January in the year of our Lord one thousand nine hundred and three, by and between The Canton-Akron Railway Company, a corporation organized and existing under the laws of the

145 State of Ohio, (hereinafter called 'Company') and the Knickerbocker Trust Company of New York, in the State of New York, a corporation organized and existing under the laws of the said state (hereinafter called 'Trustee') which word shall include any successors in the office of trustee hereby created), Witnesseth:

Whereas, The company heretofore made a certain mortgage deed to the said Trust Company as trustee, dated the first day of March, 1902, of all its franchises, and all property, real, personal and mixed, which then, or thereafter, should form a part or be appurtenant to, or be used, or intended to be used, for or in connection with any of its railway property, to secure an issue of bonds amounting

in the aggregate to two million dollars ($2,000,000) all as more fully provided in said mortgage deed, and, Whereas, in said mortgage the company covenants among other things with the said trustee that it will from time to time upon the request of said trustee execute and deliver to it such further conveyances or transfers and do such acts as said trustees might deem advisable, and as shall be required to perfect the lien and security of the trustee upon the mortgaged property, whether then owned or afterwards acquired, and, Whereas, the company since the date of said mortgage has acquired by purchase all of the property of The Canton-Massillon Electric Railway Company, a corporation organized under the laws of the State of Ohio, and has also constructed a power house
146 in the city of Canton upon certain real estate acquired therefor, and has acquired other property, both real, personal and mixed, and Whereas, the trustee has requested the company to make a supplemental mortgage to it of such property so acquired since the date of said mortgage deed, now therefore, this supplemental indenture, witnesseth: That in order to more fully secure payment of the principal and interest of the bonds secured by the said mortgage dated March 1, 1902, the said The Canton-Akron Railway Company for and in consideration of the premises and of the sum of one dollar to it duly paid by the Knickerbocker Trust Company, trustee, the receipt whereof is hereby acknowledged, does by these presents hereby give, grant, bargain, sell, release, convey, assign, transfer, and set over unto said Knickerbocker Trust Company, its successor or successors in trust, for the uses and trusts created by said mortgage deed of March 1, 1902, all of the franchises and real, personal and mixed property, and the railroad which was conveyed by The Canton-Massillon Electric Railway Company to it, said The Canton-Akron Railway Company, by deed dated the seventeenth day of June, 1902, duly recorded in Stark county records volume 405, page 379, to which deed reference is hereby made for the same full and particular description of the property so acquired from said The Canton-Massillon Electric Railway Company, the property so acquired from said The Canton-Massillon Electric Railway Company being subject to the mortgage heretofore made by said The Canton-Massillon
147 Electric Railway Company to the Cleveland Trust Company as trustee, dated May 1, 1900, to secure an authorized issue of bonds to the amount of one million dollars ($1,000,000) the amount of said bond being reduced to eight hundred and fifty thousand dollars ($850,000) by supplemental indenture made by said The Canton-Massillon Electric Railway Company to said Cleveland Trust Company Dated March 12, 1902. Also all that parcel of land situate in Canton which is described in deed of Charles R. and Bert A. Miller of Cleveland, Ohio, to it, said The Canton-Akron Railway Company, dated the nineteenth day of March, 1902, recorded in Stark county records, volume 399, page 313, together with the power house which has since been built upon said premises, and all the machinery and electrical apparatus of every name and nature now located and maintained therein; also all other real estate in Stark and Summit counties which has been acquired by the said The

Canton-Akron Railway Company by purchase or otherwise, subsequent to said first day of March, 1902, together with all personal, mixed and other property of every nature which has been so acquired by the said company subsequent to said first day of March, 1902, it being intended and it is hereby agreed that all property which has been so acquired, or which may be hereafter acquired by the railway company shall be subject to the lien created by said mortgage dated the first day of March, 1902, for the payment
148 of any and all of the bonds secured thereby and the interest to accrue thereon. To have and to hold the above granted property unto said Knickerbocker Trust Company, its successors in trust and assigns forever, but in trust nevertheless, as security for the payment of the principal and interest of the bonds described in the aforementioned mortgage and for the purposes and subject to *to* all the terms, conditions, provisions and stipulations, express or contained in said mortgage. In witness whereof The Canton-Akron Railway Company as to these presents and to one other instrument of like tenor and effect caused its corporate seal to be affixed and said instrument to be executed in its name and behalf by William H. Hoover, its president, and Philip L. Saltonstall, its treasurer, thereunto duly authorized, all on this eighth day of January in the year one thousand nine hundred and three; and the Knickerbocker Trust Company does likewise cause its corporate name to be hereto subscribed by C. T. Barney, its president and its corporate seal to be affixed by Frederick Gore King, its secretary, and also to one other instrument of like tenor and effect.

THE CANTON-AKRON RAILWAY COMPANY,
By WILLIAM H. HOOVER, *President.*
PHILIP L. SALSTONSTAL, *Treasurer.*

[CORPORATE SEAL.]

KNICKERBOCKER TRUST CO., *Trustee,*
By C. T. BARNEY, *President.*
FRED G. KING, *Secretary.*

[CORPORATE SEAL.]

149 Signed, sealed, acknowledged and delivered in presence of us who hereto subscribe our names as witnesses in attestation as to William H. Hoover, Pres., Philip Staltonstall, Treas.

JOHN C. WEALTY.
C. M. RUSSELL.

Signed, sealed, acknowledged and delivered in presence of us who hereto subscribe our names as witnesses in attestation as to C. T. Barney, Pres., Fred'k Gore King, Secy.

CHARLES S. ADDAMS.
EDW. SPOORN.

STATE OF OHIO,
Stark County, ss:

Personally appeared before me a notary public in and for said county and state, the above named William H. Hoover, president of

The Canton-Akron Railway Company, and Philip L. Saltonstall, treasurer, and acknowledged that they did sign and seal the foregoing instrument and that the same is their free act and deed and the free and corporate act and deed of The Canton-Akron Railway Company.

In testimony whereof I have hereunto set my hand and notarial seal at Canton, Ohio, this eighth day of January, 1903.

JOHN C. WELTY, [SEAL.]
Notary Public.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a commissioner of the State of Ohio in and for said State of New York, residing in said State and
150 county of New York, personally came Charles T. Barney and upon oath declared that he was president of the Knickerbocker Trust Company, and declared and acknowledged that he signed and sealed the foregoing instrument as the free and voluntary act and deed of said Knickerbocker Trust Company for the uses and purposes therein set forth, and that he was thereunto duly authorized by the board of directors of said company. Given under my hand and official seal this sixteenth day of January, 1903.

CHARLES EDGAR MILLS, [SEAL.]
Commissioner of Deeds for the State of Ohio in New York.

Received for record February 11, 1903, at 9:20 a. m. Recorded March 2, 1903.

C. A. DOUGHERTY, *Recorder.*"

(Relator moves to strike out this deed on the ground that it is incompetent, immaterial and irrelevant, but no objection as to form or as to it being a copy; motion overruled; relator excepts.)

CHARLES H. LAHR, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Mr. Holiday:

Q. What is your business, Mr. Lahr?
A. Auditor for the Northern Ohio Traction & Light Company.
Q. As such auditor do you have in your custody the various books of the company?
A. Yes, sir.
151 Q. Are you familiar with the outstanding bond issues upon the properties of the Northern Ohio Traction & Light Company?
A. Yes, sir.
Q. And you can state the aggregate amount of bonds outstanding upon the various properties of the company?
A. Yes, sir.

Q. I hand you "Defendant's Exhibit 2" and ask you whether you can state the aggregate amount in par value of the bonds that were actually issued under that mortgage?

(Relator objects, not as to form, but as to it being immaterial to this cause; objection overruled; relator excepts.)

A. $850,000.

Master Commissioners: That was hardly responsive to the question.

Q. I just asked you whether you could?

A. Yes, sir.

Q. How many bonds were issued under that mortgage?

(Relator objects on the ground that it is not material nor competent in this cause; objection overruled; relator excepts.)

A. $850,000.

Q. That is, you mean the aggregate amount par value of bonds was $850,000?

A. I mean outstanding now is $850,000.

Q. Were there any more than that ever issued?

A. I think the authorized issue was one million dollars.

Q. How many were actually issued?

A. $850,000, the records show.

152 Q. You say that $850,000 of bonds secured by that mortgage are still outstanding?

A. Yes, sir.

Q. And unpaid?

A. Yes, sir.

Q. I hand you Mr. Lahr, "Defendant's Exhibit 3" a copy of the first mortgage from the Canton-Akron Railway Company to the Knickerbocker Trust Company, dated March 1, 1902, and ask you whether you can state how many bonds were issued under that mortgage?

A. Yes, sir.

Q. How many?

A. There is outstanding at the present time one million, one hundred and fifty thousand dollars.

Q. Those are still unpaid?

A. Yes, sir.

Q. Do you know whether those have been continuously outstanding since the execution of the mortgage deed of trust?

A. I can only say since the Northern Ohio Traction & Light Company acquired the property, since that time they were.

Q. That was in 1906?

A. That was September, 1906.

Q. I hand you "Defendant's Exhibit 4," the copy of the mortgage deed of trust from the Canton-Akron Consolidated Railway Company to the Citizens Savings & Trust Company of Cleveland and S. Reed Anthony, trustees, ask you whether you can state how many of the bonds secured by that mortgage deed of trust were actually issued and outstanding and unpaid at the present time?

A. One million fifty-two thousand dollars.
153 Q. What was the total authorized issue under that?
A. Two and a half million.

(Relator objects and moves to strike out the answer because it is incompetent, immaterial to this case; motion overruled; relator excepts.)

(Relator moves that the court strike out the answer relating to "Exhibit 3" on the ground that it is immaterial, incompetent and irrelevant to this case; motion overruled; relator excepts.)

Q. Can you state what has been done with the balance of that authorized issue of two and a half million?

A. Yes, sir.

Q. You may state.

(Relator objects because it is immaterial, irrelevant and incompetent; objection overruled; relator excepts.)

A. One million of that issue are at the present time held as collateral, deposited for collateral trust notes for one million and a half.

Q. The collateral trust notes of a million and a half you refer to are collateral trust notes of the Northern Ohio Traction & Light Company?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

Q. And one million par value of the bonds secured by The Canton-Akron Consolidated Railway Company's deed of trust has been placed as collateral to secure those serial trust notes?

A. Yes, sir.

Q. What was done with the balance?

A. $290,000 are still in the treasury not certified and
154 $58,000 was just recently certified and authorized by the commission to be sold.

Q. By what commission?

A. Public Utilities Commission of Ohio; and there is $100,000 in escrow to retire the Tuscarawas Railroad Company bonds of $100,000.

Q. In whose hands are those placed in escrow?

A. I don't know.

Q. And referring again to "Defendant's Exhibit 2," the mortgage deed of trust of the Canton-Massillon Electric Railway Company to the Cleveland Trust Company, trustee, you have stated that the total amount of bonds outstanding secured by that deed of trust is $850,000 which are still unpaid, now can you state at what time those bonds totalling $850,000 were issued?

A. Yes, sir.

Q. Will you do so?

(Relator objects because the same is incompetent, immaterial and irrelevant to this case; objection overruled; relator excepts.)

A. March 8, 1901, 5 bonds, $5000; March 16, 5 bonds, $5000; March 29, 10 bonds, $10,000; April 4, 3 bonds, $3000; April 10, 6

bonds, $6000; April 20, 114 bonds $114,000; there is also a note there C. M. 6% mortgage bonds; April 20, 215 bonds, Canton Street Railway and Lakeside bonds by mortgage deeds, $215,000; April 30, 3 bonds, $3000; May 8, 35 bonds, $35,000; May 9, 10 bonds, $10,000; May 7 100 bonds, $100,000; May 11, 15 bonds, $15,000; June 10, 3 bonds, $3000; total $524,000; statement of account
155 as it appears on ledger A of the Canton-Massillon Electric Railway Company's books, bonds February 1, 1902 by old ledger $524,000; March 31, by E. H. Rawlins & Son, $89,752; same date, E. H. Rawlins & Son, $92,500; same date, E. H. Rawlins & Son, $40,700; same date, E. H. Rawlins & Son, $60,125; April 30, E. H. Rawlins & Son, $18,500; April 30 by Journal, $24,450; total $850,000; June 1, by balance, $850,000.

Q. June 1 of what year?

A. 1902, I imagine, I am not positive about that.

Q. You have charge of the cancelled coupons upon the various bonds secured by mortgages on the company's property?

A. Yes.

Q. Those coupons are all "payable to bearer" are they not?

A. I am not so familiar as to the reading of the coupons.

Q. Do you know from what territories or from where the holders of those coupons come?

(Relator objects; objection overruled; relator excepts.)

A. We could not tell where they came from until this income tax came in, you can tell it now because there are certificates attached to them.

Q. Well, you can state as to the last coupons that you have received, what territories they came from and what persons?

A. I am not familiar about that, I haven't read them over, only a certificate is attached to it.

156 Q. Have you ever examined those certificates?

A. Only as to the exemption part, whether they are exempt or not exempt from taxes.

Q. Could you state anything as to the locality of residence of the holders of those bonds?

A. No, I could not, they are widely distributed.

(Relator moves to strike out all of the testimony of the witness, Charles Lahr, on the ground that it is incompetent, irrelevant and immaterial, no objection being made, however, as to the form of questions or as to the question of secondary evidence; motion overruled; relator excepts.)

Cross-examination.

By Mr. Pontius:

Q. Mr. Lahr, how long have you been auditor of the Northern Ohio Traction & Light Company?

A. About eight years.

Q. And you are then to some extent familiar with the properties of the Northern Ohio Traction & Light Company?

A. Yes, sir.

Q. The Northern Ohio Traction & Light Company is the owner of the electric interurban railroad from Cleveland, Cuyahoga county, to Akron, Summit county?

A. From Newburg.

Q. Newburg being part of Cleveland, is it not?

A. That is the limits.

Q. From the southerly city limits of Cleveland to Akron?

A. Yes.

Q. You know how many miles?

A. From Cleveland to Akron; is about 29 miles to Newburg.

157 Q. Then the Northern Ohio Traction & Light Company, the defendant here, own the city lines in the city of Akron?

A. Yes, sir.

Q. City of about 75,000 population?

A. They claim 100,000 now.

Q. You know how many miles of track in the city of Akron?

A. I can't state that.

Q. Can you give us approximately the number of miles?

A. No, I can't tell you; I wouldn't be in position to tell you.

Q. The Northern Ohio Traction & Light Company owns the line leading from Akron, Summit county to Barberton, Summit county?

A. Yes.

Q. Distance of about eight miles?

A. Not quite eight miles.

Q. Now, there is a branch line runs off of the Akron-Cleveland line to Cuyahoga Falls running from Cuyahoga Falls to Ravenna, Portage county?

A. Yes.

Q. That is owned by the Northern Ohio Traction & Light Company?

A. Yes.

Q. You know that mileage?

A. No, sir.

Q. Now, the defendant company then owns the line from Akron, southwardly through Summit county to Canton, Ohio?

A. Yes, sir.

Q. And do you know that distance?

A. No, sir.

Q. And — owns the city lines in the city of Canton?

A. Yes, sir.

Q. You know the mileage in the city of Canton?

A. No, sir.

158 Q. Then it owns the line between Canton and Massillon?

A. Yes, sir.

Q. It owns the line from Massillon westward to East Greenville, Stark county, does it not?

A. Yes.

Q. It owns the line from Massillon southwardly through Stark county into Tuscarawas county to Dennison, Tuscarawas county?

A. To Urichsville.

Q. You know the total mileage of the Northern Ohio Traction & Light Company?
A. The entire system?
Q. The entire system.
A. On January 1, 1914, the mileage was 233 22/100 miles.
Q. Was there any increase in the mileage since then?
A. I don't know of any.
Q. Does that mileage include the double tracks?
A. Yes, sir.
Q. That is included within that mileage?
A. Yes, sir.
Q. Now, they have a large power house located at Cuyahoga Falls for the Cleveland-Akron division?
A. At the gorge.
Q. Close to Cuyahoga Falls?
A. Yes, sir.
Q. That is not on the Canton-Massillon line?
A. No, sir.
Q. You have a power house in the city of Akron?
A. We have one there but not operating it, no.
Q. You have a power house in the city of Canton?
A. Yes, sir.
Q. Have you any other power house?
A. We have one at Cuyahoga Falls but it is not operated; aside from that we only have sub-stations.
159 Q. How many sub-stations are there, do you know, on your entire line?
A. I think there are 11.
Q. There is no sub-station on the Canton-Massillon line, is there?
A. Yes, there is one in the Massillon barn.
Q. But that is not on the road leading between Canton and Massillon, that is outside of Canton or outside of Massillon?
A. No, sir.
Q. There is no sub-station between the westerly limits of the city of Canton and the easterly limits of the city of Massillon along the lines of the N. O. T. Company?
A. No, sir.
Q. And there is no power house along the line of the Canton-Massillon road between the limits of these two cities?
A. No, sir.
Q. Do you know the mileage between the western limits of the city of Canton and the eastern limits of the city of Massillon?
A. I do not.
Q. You know that approximately?
A. I do not.
Q. Do you know where Lake Junction is in the city of Canton?
A. I do.
Q. Do you know whether that is within the city of Canton or within the city of Canton?
A. I think it is in the city.
Q. I call your attention to this statement in "Defendant's Ex-

hibit 4," which reads as follows, in describing the properties covered by the mortgage: "Also in an easterly direction from the east corporation line of the city of Massillon along the highway to
160 Lake Junction, a distance of 4.80 miles of main track, and .4 of a mile of sidings, more or less" is that statement about right?

A. I don't know.

Q. This mortgage deed is dated October 12, 1906, you don't know anything about that?

A. No.

Q. Now, I hand you this paper which may be marked for identification "Relator's Exhibit A," have you familiarized yourself with one of these reports?

A. Yes, sir.

Q. Probably helped to get it up, did you not?

A. Yes, sir.

Q. I will ask you if this plat of the N. O. T. system as shown on this map in red lines is approximately a correct plat of that system, if you know?

A. It is supposed to be.

Q. Now, you have said that there is $850,000 of outstanding bonds of the Canton, Massillon Electric Railroad Company?

A. Yes.

Q. That is the par value of those bonds?

A. Yes.

Q. Do you know what they were sold for on the various dates that you have detailed here of their being sold?

A. I do not.

Q. You don't know whether they were sold for ten cents on the dollar or twenty-five cents on the dollar?

A. I don't know.

Q. And you don't know as a matter of fact, Mr. Lahr, whether they were given away, do you?

A. I do not.

Q. You have stated that there is $1,150,000 of Canton-Akron Railway Company first mortgage bonds outstanding?

A. Yes, sir.

161 Q. Now, that Canton-Akron Railway Company owned many other properties than the Canton-Massillon line at the time that mortgage was given, didn't it, or don't you know about that?

A. I think the only property they owned was the Canton-Massillon line and the line between Akron and Canton.

Q. Didn't they own the Canton city lines?

A. They came under Canton-Massillon holdings.

Q. But the Canton-Akron Railway Company mortgage is this mortgage, is it not, known as "Defendant's Exhibit 3?"

A. Yes, sir.

Q. That Canton-Akron mortgage covered the lines in the city of Canton, line between the city of Canton and the city of Akron, did it not, as well as the Canton-Massillon line?

A. To Navarre.
Q. To Navarre?
A. Yes.
Q. To and including Navarre?
A. Yes.
Q. You don't know what those bonds were sold for, do you?
A. I do not.
Q. You don't know whether they were given away or not, do you?
A. No.
Q. Those bonds may have been given away as bonus-s for stock so far as you know?
A. I couldn't say.
Q. Now, then there is one other issue of bonds covers the line between Canton and Massillon, that is the Canton-Akron Consolidated Railway Company construction mortgage bonds?
A. It covers other lines besides that.
162 Q. That covers the Canton-Massillon road?
A. Yes, that is included.
Q. Do you know what lines that includes?
A. It includes all of the lines from Akron to Urichsville.
Q. Including the city lines in Akron?
A. No, sir.
Q. All lines from the east limits of Akron to Urichsville, Ohio?
A. Yes, sir.
Q. And include in it the city of Massillon and the city of Canton lines?
A. Yes, sir.
Q. Those bonds were known as "Construction Mortgage Bonds," were they not?
A. Consolidated mortgage bonds.
Q. You don't know whether those bonds were sold at par?
A. No.
Q. You know anything about them?
A. I am not in position just now to state what they got without looking up the records.
Q. Do you know when those bonds were issued?
A. I think in 1906.

Mr. Welty: What is that, the two million?
A. Yes, the two and a half million.

Q. Now, what is the capital stock of the Northern Ohio Traction & Light Company?
A. The authorized common stock is ten million dollars, preferred, five million.
Q. And dividends have been paid upon this common stock?
A. Yes, sir.
Q. And on the preferred stock?
A. Yes, sir.
Q. How much preferred stock was outstanding December 31, 1913?

A. $2,824,320.

163 Q. How much common?

A. $9,000,000.

Q. Making a total issue of capital stock of $11,824,320?

A. Yes, sir.

Q. Do you know the total bonded indebtedness of the Northern Ohio Traction & Light Company, December 31, 1913?

A. Yes.

Q. What amount was that?

A. That is outstanding, $11,668,000.

Q. That is par?

A. That is par.

Q. You figure these bonds at par?

A. Yes, sir.

Q. Now, do you know what the total value of the property of the Northern Ohio Traction & Light Company was December 31, 1913?

A. According to the trial balance $25,327,249.27.

Q. That is according to the report by the officers of the company to the stockholders at the end of the year 1913?

A. Yes.

Q. Is the reported valuation of their property?

A. Yes.

Q. Property of this defendant company?

A. Yes.

Q. What was the total liabilities of the company at the end of the year 1913?

A. $25,990,494.11.

Q. That is the total assets, is it not?

A. That is liabilities you asked me.

Q. What was the total assets of The Northern Ohio Traction & Light Company according to this report at the end of the year 1913?

A. $25,990,494.11.

Q. That is total assets?

A. Yes.

Q. Now, according to this report made to the stockholders

164 by the officers of your company at the end of the year 1913 the total liabilities are the same amount, are they not?

A. Yes.

Q. You have in their profit and loss, surplus $1,041,324.59?

A. Yes.

Q. What is that?

A. That is profit and loss surplus.

Q. What do you mean by that?

A. That is merely a book account, that is the name of the book account.

Q. What items are included in that book account?

A. All items of earnings are thrown into that account and the expenses and the difference between the two is the profit and loss.

Q. You are an expert auditor, I presume, as an auditor you are an expert on that?

A. I am an auditor, I won't say I am expert.

Q. You understand all the figures in this report?
A. Yes.
Q. So the liabilities at the end of the year 1913 according to the report by the officers of the company to the stockholders were not less than the assets, isn't that true?
A. The assets were not less you say?
Q. Yes.
A. No, they are the same, both assets and liabilities.
Q. To the cent?
A. Yes.
Q. And included in those liabilities is the account there of over one million dollars?
A. Yes.
Q. That is put in there to make the balance?
A. That is the account in which you clear your books each year.
165 Q. You don't mean to say that the Northern Ohio Traction & Light Company is insolvent, do you?
A. No, sir.
Q. It isn't insolvent, is it?
A. No, sir.
Q. Paid a stock dividend last year?
A. Yes.
Q. Both common and preferred stock?
A. Yes.
Q. You know how much?
A. Yes.
Q. Tell us—the percentage I mean, what per cent of the common and what per cent of the preferred stock?
A. It paid 5% on the common and 6% on the preferred.
Q. Did it pay 5% for the entire year on an issue of nine million dollars?
A. Yes, sir.
Q. And six per cent. for the entire year on an issue of $2,824,000?
A. No, that issue wasn't outstanding in entire year, it was sold during the year, but at the end of the year that much was outstanding.
Q. Do you know how much was issued during the year, preferred stock?
A. No, I couldn't tell you that; something over one million dollars, I think.
Q. What were the gross earnings of the Northern Ohio Traction & Light Company for the year 1913?
A. $3,284,532.62.
Q. What were the net earnings?
A. $1,264,878.89.
Q. Do you know the amount of the capital stock of the Canton-Massillon Electric Railway Company?
A. I do not.
Q. Is that company still in existence, do you know?

A. I don't know.

166 Q. Is the Canton-Massillon Electric Company doing any business?

A. No, sir.

Q. The Canton-Massillon line, that is the line on the highway between Canton and Massillon is operated by the Northern Ohio Traction & Light Company, is it not?

A. Yes, sir.

Q. And is the Canton-Akron Railway Company doing any business?

A. No, sir.

Q. The lines owned by that company are now operated by The Northern Ohio Traction & Light Company?

A. Yes, sir.

Q. You don't know the amount of stock of the Canton-Massillon Railway Company?

A. I do not.

Q. Or the Canton-Akron Railway Company?

A. I do not.

Q. Or of the Canton-Akron Consolidated Railway Company?

A. I do not.

Q. This "Relator's Exhibit A" on the cover of which there is the following "Northern Ohio Traction & Light Company, Akron, Ohio. Annual report for the year ending December 31, 1913," is an accurate report of the officers of the company to the stockholders for that year, is it not?

A. Yes, sir.

Relator offers in evidence annual report for the year ending December 31, 1913 of the defendant company, marked "Relator's Exhibit A."

Master Commissioner: It may be admitted in evidence.

And the hour of adjournment having arrived the further hearing of this case is adjourned to 9:30 o'clock Wednesday morning, May 20, 1914.

167 AUSTIN LYNCH, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welty:

Q. Mr Lynch, you are a member of the bar of this county, I believe?

A. Yes, sir.

Q. And have been for a number of years?

A. Yes, sir.

Q. You are a brother of William A. Lynch, deceased?

A. Yes, sir, I am.

Q. Do you remember the circumstances of your brother organizing the Canton-Massillon Electric Railway Company?

A. Yes, sir, I do.

Q. And the building of the electric railway between Canton and Massillon by that company?

A. Yes, I remember that quite well.

Q. Do you know about what distance it is between the public squares of Massillon and Canton?

(Relator objects; objection overruled; relator excepts.)

A. It is said to be almost exactly eight miles.

Q. At the time when that electric railroad was built between the two cities was there any other electric railway connecting Massillon and Canton?

(Relator objects; objection overruled; relator excepts.)

A. There was not.

Q. And following that you now live on the farm fronting the highway between Massillon and Canton, do you not?

A. Yes, sir, I do.

168 Q. I will ask you whether or not there is at the present, or has been at any time since the Canton-Massillon Electric Railway Company constructed the line between Canton and Massillon, any other electric railroad between Canton and Massillon?

(Relator objects; objection overruled; relator excepts.)

A. There has not been.

Q. At the time when the Canton-Massillon Electric Railway was constructed were you familiar with the lands lying between Massillon and Canton?

A. I was in a general way.

Q. And you have been ever since that time?

A. Yes, sir.

Q. In a general way you may state what buildings and improvements have been made along the Canton-Massillon road upon which the railway is located, since the location of the railway by the Canton-Massillon Electric Railway?

(Relator objects; objection overruled; relator excepts.)

A. There have been a great many residences constructed along and near to the road between the cities of Canton and Massillon since the Canton-Massillon Electric Railroad was built in 1892; in addition to residences there has been an academy or girls' school built by an order of sisters at a point about half way between the two cities; that was built about seven years ago.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

169 Q. Do you know about how much of an investment was made in that girls' school or academy at Mt. Marie?

(Relator objects; objection overruled; relator excepts.)

A. Having been attorney for the sisters in all their business matters in connection with the purchase of the land and the construc-

tion of the academy or school building, I know in a general way about the investment and the cost of the property.

Q. About how much was the cost of the property as it was when completed—that is, the building is not completed—partly completed?

(Relator objects; objection overruled; relator excepts.)

A. The total investment there is something over $175,000.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Q. Have you seen the plans that they contemplate in the completion of the academy?

(Relator objects; objection overruled; relator excepts.)

A. Yes; I saw an elevation plan purporting to be a plan of a completed building, that is to say, of a building more extensive than the present one; I don't think I saw ground plans for anything excepting the present structure.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

170 Q. Has the college been in operation since it was built?

A. Yes, sir, it has been.

Q. Do you know in a general way about how many scholars attend that academy?

A. Well, it would only be in a general way; I have had children attending the school every year since it was built, I know in a general way about what the attendance is.

Q. About how large?

A. About 125.

Q. That school has been in session and operation ever since it has been built?

A. It has been.

Q. Is there any other street or electric railway near to that school other than the one upon the Canton-Massillon road now owned and operated by The Northern Ohio Traction & Light Company?

(Relator objects; objection overruled; relator excepts.)

A. There is not.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Q. About how far is that school from the public square in Canton?

A. About 3½ miles, trifle over that; it is less than 4 miles.

Q. The four mile limit I believe is at Richville-Reedurban road?

A. Yes, sir.

Q. You may state, Mr. Lynch, whether or not there has been operated over the tracks of the electric railway on the Canton-Massillon road cars ever since the Canton-Massillon Railway Company completed that road?

A. There have been.

Q. Your brother was practically the owner of the entire stock of the Canton-Massillon Electric Railroad Company, or a large
171 portion of it, was he not?

A. No, sir, he was not.

Q. He was not the owner?

A. No, sir.

Q. Was he the owner of a large part of it?

(Relator objects; objection overruled; relator excepts.)

A. He was of a large part.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Q. Were you familiar with the condition of the company during the time your brother was connected with it?

A. You mean financial condition?

Q. Yes.

A. I couldn't say that I was, no, sir.

Q. There were $850,000 of bonds marketed, do you know whether your brother marketed those or not?

(Relator objects; objection overruled; relator excepts.)

A. I couldn't say; I wouldn't say because I don't know.

Q. Mr. Lynch, do you know whether Mr. Robert A. Miller is living now?

A. I understand that he died a couple years ago.

Q. Do you know whether Mr. A. J. Underhill is in the city now?

A. He is not; he is in Florida.

Q. Are you familiar with the signature of Mr. A. J. Underhill?

A. I would think so, yes, sir.

Q. You may look at the record book of the Canton-Massillon Electric Railway Company on page 24, state whether or not in your judgment and opinion the signature of A. J. Underhill as secretary there is or is not his hand writing?

172 A. Yes, I am quite sure it is; it looks like his hand writing; I am quite familiar with his hand writing.

Q. I don't know whether you was familiar with Robert Miller's, or not?

A. Not nearly so familiar with his hand writing, although I have seen him write his name; I hardly think I am sufficiently familiar with his hand writing to positively say that I can identify it.

Q. The signature of Mr. Underhill which I called your attention to on page 24, so that it may be in the record, is at the conclusion of the first meeting of the directors of the Canton-Massillon Electric Railway Company, is it not?

A. Well, that appears to be the heading on page 15, first meeting of the directors of the Canton-Massillon Electric Railway Company.

Defendant offers in evidence in connection with the testimony of the witness, pages 16 and 17 of the minutes of the first meeting of the directors of the Canton-Massillon Electric Railway Company,

held on April 25, 1892, as appears in the record book of the Canton-Massillon Electric Railway Company marked "Defendant's Exhibit 5."

(Relator objects to this on all grounds; objection overruled; relator excepts.)

Q. I will ask you, Mr. Lynch, taking the first meeting of the directors of the Canton-Massillon Electric Railway Company of April 25, 1892, as appears upon pages 16 and 17 of the minutes of the company, which are signed by Mr. Underhill, and which you have identified the signature, I wish you would read
173 that part of the minutes beginning on page 16 "The President then submitted" and read all that part of page 16 and page 17?

(Relator objects because the pages are in evidence and being in, why should the witness read this into the record?)

Master Commissioner: This is one way of getting the testimony in the record in that form and he may read it in the record, but this is with the understanding that there is no stipulation that that takes the place of the original record, and in order to have their record of this meeting properly in the record they will have to introduce this book.

Counsel for Relator: The book hasn't been admitted in evidence.

Master Commissioner: Not yet, no.

Counsel for Relator: Then we object to him reading; and if the pages of this book are in evidence we ask that they be stricken out especially upon the ground that on page 17 of this record there is an erasure and substitution of the word "perpetual" in ink different from the ink in which the original record was written, and the hand writing is different than the original hand writing of the record.

(Motion overruled; relator excepts.)

Q. Now, Mr. Lynch, will you read that part of the minutes beginning on the middle of page 16 and including all of page 17?

A. Reading from about the middle of page 16: "The President then submitted to the board a copy of the resolution of the
174 county commissioners of Stark county, Ohio, granting a franchise for the construction of a railroad from the corporation limits of the city of Massillon to the Lake Curve which he offered to transfer and assign to the company for the sum of $13,900 of the company's full paid stock. On motion the assignment of said franchise from said Lynch to the said company was accepted by the directors present, except Mr. Lynch, who refrained from voting. And at his request it was ordered that this vote be submitted to the meeting of the stockholders of the company for their approval or disapproval before it is carried out. The president stated to the meeting that the city council of the city of Massillon had undertaken to grant a franchise for the construction of the said railway on said highway between the towns named in the resolutions of the county commissioners to J. W. McClymonds, and that the question arose as to the validity of said franchise. That in

his opinion the franchise granted by the county commissioners was sufficient for the purposes of this company and more desirable than the franchise assumed to be granted by the city of Massillon in this, that the former was perpetual, as the latter is limited to a period of 25 years. He advised, however, that said latter franchise should also be acquired as a further assurance of this company's right to build and operate its proposed railroad upon said highway.

Thereupon by motion and by unanimous vote of the directors
175 the president was authorized to secure a right to use the tracks of the Massillon Street Railway Company from the corporation line in said city of Massillon to Erie street, or to make an agreement with the Massillon Street Railway Company for the purchase of its entire line when constructed." I stopped reading at the end of the third line on page 18.

Q. Do you know, Mr. Lynch, or about the time when the Canton-Akron purchased the property?

A. No, I do not.

Q. You don't remember that?

A. No, sir.

Q. Do you remember about the power house changes, etc. being made after the Canton-Massillon Electric Railway sold out to the Canton-Akron?

A. Well, I remember there was a very considerable change in the power house, but I can't fix the date of it with reference to the sale you refer to.

Q. You remember a change was made?

A. I remember a change.

Q. Can you tell us in brief about that change, that is, the nature and extent of it?

(Relator objects because there is better evidence.)

Master Commissioner: It appears to me there ought to be better evidence of this.

Counsel for Defendant: We think there is better evidence and we will withdraw the question.

Q. Mr. Lynch, do you remember the change in the construction of the road at Reedurban about five years ago, from Reedurban east passed the Mt. Marie College?

A. Yes, I remember that; I didn't think it was quite that long ago.

176 Q. It was in 1909 I believe, it will be five years this summer, you remember what changes were made there in a general way?

A. The road was double tracked for a distance of about a half mile, and side poles removed and center pole construction adopted, and the double track was ballasted with stone.

Q. Was the track that was originally there moved from the side to the center?

A. I am unable to say whether either of the tracks there is in the location of the original track, I can't say.

Q. Mr. Lynch, when did you purchase the land that you now own?

A. Eleven years ago.
Q. At that time was this electric railroad in operation?
A. It was.
Q. Since the purchase you have placed on your land valuable improvements?
A. I built a house there.
Q. And live there?
A. Yes.
Q. And make your home there?
A. Yes, sir.
Q. You may state whether or not you purchased the land and made the improvements with a view of making it your future home?

(Relator objects; objection overruled; relator excepts.)

A. No, sir, I did not.
Q. You afterwards resolved that?
A. Yes, sir.
Q. And did the fact that the street railway was there and in operation influence you in the purchase of the property and the building of the house and your location there?

177 Relator objects; objection overruled; relator excepts.)

A. Well, I suppose that it did and yet I can't say what I might have done or might not have done even if it had not been there.
Q. That was one of the inducements to make the location?

(Relator objects; objection overruled; relator excepts.)

A. Oh, yes, undoubtedly.

Cross-examination.

By Mr. Pontius:

Q. Mr. Lynch, you were associated with your brother, William A. Lynch, at the time the franchise was granted to William A. Lynch for the construction of this interurban railway, were you?
A. You mean associated in the enterprise?
Q. No, in the law business?
A. Well, to a slight extent, yes; he was out of general practice at that time Mr. Pontius, but he at all times had some matters in which we were both interested, that is, legal matters.
Q. Do you know, Mr. Lynch, whose hand writing the body of this record "Defendant's Exhibit 5" pages 16 and 17 is?
A. No, I am unable to tell you whose hand writing that is; I was looking at that when I had the book here reading over it, I tried to call to mind whose hand writing it might be but I can't say.
Q. That is not Mr. Underhill's hand writing?
A. No, sir.
178 Q. And not Mr. Miller's hand writing?
A. No, sir.
Q. And it is not the hand writing of William A. Lynch?
A. No, sir, it is not; no part of it.
Q. And calling your attention to the word "perpetual" on page

17 of this book identified as "Defendant's Exhibit 5" do you know whose hand writing that is?

A. I do not.

Q. It is apparent to you, is it not, that it is not the same handwriting as the rest of the writing on the page?

A. Well, doesn't look like the rest of the hand writing on the page, no, sir.

Q. And you notice that the ink of the word "perpetual" is different ink than the ink of the other words on the page, isn't that true?

A. It seems to be a different ink.

Q. And you can see that there was an erasure at that place on this book, can you not?

A. Yes, there is some indications of an erasure where the word "perpetual" is written.

Q. Do you know who has had possession of this book? Where did you first see this book?

A. No; I think I saw that years ago when my brother and his associates controlled the Canton-Massillon Electric Railway Company, but I haven't seen it for many years.

Q. You don't remember the exact words in the book, however?

A. No, I never had any occasion to look at that part of the record; I have had occasion to use that record in connection with a
179 lawsuit that I helped to try for the Canton-Massillon, a suit brought by a property owner for damages, and I think on certain matters I had some occasion to look at that book, but it wasn't used in evidence; I think since that time I have never seen the book.

Q. Did you know whether that word "perpetual" was there when you formerly saw this book, on page 17 of this book?

A. I never had occasion to look at that part of the record before today.

Q. In whose possession did you see this book recently, if any ones?

A. I never saw it until this morning.

Q. Who gave it to you this morning?

A. Mr. Welty showed it to me at the trial table.

Q. That is Mr. Welty, counsel for the Northern Ohio Traction & Light Company?

A. Yes.

Q. The defendant in this case?

A. Yes, sir.

Q. You say Mr. Underhill is in Florida?

A. Yes, sir.

Q. That is, you have been told he is down there?

A. Yes.

Q. Do you know when he expects to return to Canton?

A. Why probably in a few weeks, I think.

Q. That is Mr. Underhill the secretary of this original company?

A. Yes, A. J.

Q. Robert A. Miller, the chairman is deceased?

A. Yes, sir.

Q. This Canton-Massillon road, Mr. Lynch, runs in an easterly and westerly direction between the cities of Canton and Massillon?

A. Yes, sir.

180 Q. Canton being east from the city of Massillon?

A. Yes, sir.

Q. Do you know how far it is from the eastern limits of the city of Massillon to the western limits of the city of Canton?

A. About 5½ miles.

Q. Now, at the time this interurban railway was constructed between Canton and Massillon there were city electric lines in Canton, were there not?

A. There was, yes, sir.

Q. That run out practically to the western limits of the city of Canton.

A. Run out to what was then the westerly limits of the city of Canton.

Q. And this Canton-Massillon Electric Railway Company did not build from the western limits of the city of Canton to the center of Canton at that time?

A. No, sir.

Q. And those westerly limits of the city of Canton at the time of the construction of the Canton-Massillon railroad were about a mile or mile and a quarter west of the square of the city of Canton, were they not?

A. Well, a mile and a quarter to a mile and a half, I should say, west from the center of the city of Canton.

Q. They run to what is known as Lake Junction, did they not?

A. Yes, sir.

Q. Lake Junction is now in the city limits of Canton?

A. Now within the city limits.

Q. And on this Canton-Massillon road between a mile and a quarter and a mile and a half west of the center of the city of Canton?

A. Yes, sir.

181 Redirect examination.

By Mr. Welty:

Q. Mr. Lynch, your attention has been called to an erasure and change of ink in the word "perpetual" on page 17, I will ask you to look at the same minutes of the same meeting on page 24 and in the sixth line from the top whether or not you do not find an erasure there and the word "employ" written in, and in the same line the word "and " written in there with apparently the same ink as used in the word "perpetual" on page 17?

(Relator objects; objection overruled; relator excepts.)

A. There appears to have been an erasure at the beginning of the sixth line on page 24, where the word "employ" is now written; and further on in the same line the word "and" is written in; in regard to the ink, I would simply say that it looks like the ink used

in writing the word "perpetual" on page 17, whether it is the same or not, I have no knowledge.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Recross-examination.

By Mr. Pontius:

Q. Mr. Lynch, you know the handwriting of the person who wrote the word "employ" and the word "and" on page 24 of this "Defendant's Exhibit 5?"

A. I do not.

Q. Those words stand out much more prominently than the rest of the words written in ink on the page?

A. They are in blacker ink.

182 Q. And it may be that they have been written since the other words were written on that page?

A. Of course that is possible.

Q. Not having faded so much as the other words on the page?

A. Well, they appear to be in darker ink; I have no idea when they were written or by who.

Q. Not written by William A. Lynch, your brother?

A. No, sir, not his hand writing.

Q. It is not the hand writing of A. J. Underhill, secretary?

A. No, sir, not his hand writing.

Q. And not the hand writing of Robert A. Miller, chairman?

A. No, sir.

Q. And this word "perpetual" on page 17 stands out more distinctly than the other words on that page?

A. Yes, it is blacker ink and apparently a different hand.

Q. And this word "perpetual" appears to have been written since the rest of the words on this page 17, isn't that so?

A. Well, I can't say; it appears to have been made after an erasure was made.

(Relator moves that "Defendant's Exhibit 5," pages 16, 17 and 18 be stricken from the record in this case, it being apparent that some change was made from the original record, and in the original record at a date since the making of the original record; motion overruled; relator excepts.)

(Relator moves that this Exhibit 5 be striken out for the reason that it has not been proven that it is the original record of the first directors' meeting of the Canton-Massillon Electric Railway

183 Company; motion overruled; relator excepts.)

Further redirect examination.

By Mr. Welty:

Q. Mr. Lynch, do you know whether that is the original book of the stockholders and directors of the Canton-Massillon Electric Railroad Company?

A. I couldn't say; it looks like it; I know we had occasion about

the time of that lawsuit I was speaking about to look at some of the original records of the Canton-Massillon road.

Q. This book was presented among them?

A. It is my recollection that I examined something in that book at that time, but not this part in question here.

That is all.

CHARLES CURRIE, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welty:

Q. Mr. Currie, do you know whether or not when the Northern Ohio Traction & Light Company purchased the Canton-Akron property, the Canton-Massillon Electric property whether that book marked "Exhibit 5" was among the property turned over?

A. I think it was, but I didn't make any special examination as to the books that were turned over.

Q. You are the general manager of the defendant, The Northern Ohio Traction & Light Company?

A. Yes, sir.

184 Q. And it is said that in 1906 The Northern Ohio Traction & Light Company purchased from the Canton-Akron Consolidated Railway Company the properties of the Canton-Akron Railway Company, Canton-Massillon Electric Railway Company and the Canton-Akron Consolidated Railway Company?

(Relator objects because there is better proof of this.)

Q. Do you remember that circumstance of the taking over of those properties?

A. What month did you say?

Q. I didn't say what month, in 1906?

A. In 1906, yes, sir.

Q. Since that time have you been the general manager of The Northern Ohio Traction & Light Company?

A. Yes, sir.

Q. Now, do you remember the property of The Canton-Massillon Electric Railway Company before it passed into the hands of the Canton-Akron Railway Company?

A. Yes, sir.

Q. I believe that a new power house was built by the Canton-Akron in Canton here?

A. Yes, sir.

Q. Those books you have in your possession, have you not, showing that?

A. We have.

Q. Now, Mr. Currie, since the Northern Ohio Traction & Light Company have acquired the Canton-Massillon Electric Railway property, what improvements, if any, have been made upon that part formerly owned by the Canton-Massillon Electric Railway

Company, which includes the lines in the city of Canton,
185 Massillon, the interurban between Massillon and Canton, and the interurban between Massillon and Navarre, and the Greenville line, I believe it is?

(Relator objects; objection overruled; relator excepts.)

A. We have double tracked half a mile on the Canton-Massillon between Canton and Massillon at a point known as Reedurban; we have also extended a line from Brookfield to East Greenville, a distance of approximately three miles.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

A. Now, do you desire the improvements in the city?
Q. Yes.
A. We have made an extension of the line on Lake street from Belden avenue to Superior street; we have extended the South Market street line for a distance of probably one thousand feet, forming a loop at the end of the South Market street line; that, I think is all.

Master Commissioner: That is in the city of Canton?
A. That is in the city of Canton.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Q. The double tracking that you speak of at Reedurban was that done according to the franchise granted you in 1909 by the commissioners of this county, as appears from defendant's exhibit number one?

(Relator objects.)
186 Master Commissioner: The question is somewhat leading.

Q. It is said that in 1909 the commissioners granted you a right to double track and make improvements at Reedurban?
A. Yes, sir.
Q. Were the improvements made accordingly under that franchise and consent by the commissioners?
A. Yes, sir.
Q. What was the expense of that improvement at Reedurban thus made under this franchise of 1909, if you know?

(Relator objects; objection overruled; relator excepts.)

A. Yes; I took these figures from our records, the record books in Akron of this improvement, and it amounts to $11,225.44.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Q. Mr. Currie, the Northern Ohio Traction & Light Company in 1906, when it purchased the property formerly owned by The Canton-Massillon Electric Railway Company, what electric railways did the Northern Ohio Traction & Light Company have and operate just before that purchase?

(Relator objects; objection overruled; relator excepts.)

A. They operated an interurban line from Cleveland to Akron; operated the Akron city lines, the entire Akron city lines; the interurban line from Ravenna to Wadsworth; you are re-
187 ferring to railway lines?

Q. Yes.

A. That is all.

Q. At the time of the commencement of this action what interurban line—or you may state whether or not the Northern Ohio Traction & Light Company operated an interurban line between Cleveland and Uhrichsville?

A. Yes, sir.

Q. State whether or not the Canton-Massillon line was a part of that interurban line or link in that chain?

(Relator objects because it shows for itself whether it is a link; objection overruled, relator excepts.)

A. It was.

(Relator moves the court to strike out the answer; motion overruled; relator excepts.)

Q. You may state whether or not the defendant company had prior to that time been selling to its patrons through tickets over the interurban line?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

Q. And you may state whether or not through cars were operated between New Philadelphia and Cleveland or Akron?

A. Yes, sir.

Q. Now, you may tell just what—suppose a car started at New Philadelphia, over what road would it go in passing to Canton for instance and to Akron and Cleveland?

A. It would go over the original Canton-New Philadelphia line——

188 Q. To what point?

A. To Navarre; from Navarre to Canton on the Canton-Massillon Electric Railway Company's lines; and from the city of Canton limits over the Canton-Akron Company's lines to Akron, then over the Northern Ohio Traction & Light Company to Cleveland.

Q. When did the through service begin after you purchased this road in 1906?

A. I can't say the exact date of it.

Q. I mean, soon after?

A. You mean the through service from Cleveland to New Philadelphia?

Q. The operation of the interurban service through from Cleveland to Uhrichsville?

A. Oh, well might——

Q. State whether or not it has been in continuous operation since that time.

A. Yes, sir.

Q. What effect upon your continuous service would it have if the railway track between Canton and Massillon upon the public highway was removed?

(Relator objects; objection overruled; relator excepts.)

A. It would be what would say ruinous to the service absolutely.

Q. And as to the property?

A. I would use the same phrase "ruin."

Q. Could you operate through service if that was taken up?

A. No, sir; it is evident you could not give through service with that line gone.

Q. What became, Mr. Currie, if you know, of the street cars that were in use and operation on the Canton-Massillon road be-
189 tween Massillon and Canton since the N. O. T. purchased it, what became of the old ones?

A. They were destroyed.

Q. New cars put on?

A. New cars placed on.

Q. How frequent, at the commencement of this action and before, how frequent were cars operated over this line in controversy in this case?

A. Every half hour.

Q. How about the traffic along that line?

A. Traffic is very heavy between Canton and Massillon.

Q. And intermediate points?

A. And intermediate points, yes, sir.

Cross-examination.

By Mr. Pontius:

Q. How long have you been manager of the Northern Ohio Traction and Light Company?

A. Almost thirteen years.

Q. Is the Canton-Massillon Electric Railway Company still in existence?

A. Yes, sir.

Q. Who owns its stock?

A. Northern Ohio Traction & Light Company.

Q. All of it?

A. Yes, sir.

Q. Who are the directors of the Canton-Massillon Railway Company?

A. I can't say off-hand who they are.

Q. Has it a board of directors?

A. I can't say to that.

Q. Did you ever hear of the directors of the Canton-Massillon Railway Company having a meeting?

A. No.

190 Q. Is the Canton-Akron Railway Company still in existance?

A. Yes.

Q. Do you know who the directors of that company are?
A. I think the directors of that company are in Cleveland.
Q. Who owns the stock of that company?
A. The Northern Ohio Traction & Light Company.
Q. All of the stock?
A. Yes, sir.
Q. You know whether the Canton-Akron Consolidated Railroad Company is a corporation?
A. Yes, sir.
Q. At this time?
A. Yes, sir.
Q. At the time of the filing of this petition in this case?
A. Yes, sir.
Q. You know who the directors of that company are?
A. I think the same directors as the Canton-Akron Railway Co.
Q. You don't know who they are?
A. I think Mr. Duncan is one, of Squire, Sanders & Dempsey's office, I think there was three or four members of Squire, Sanders & Dempsey's firm composed the directors.
Q. The same persons officers of the Northern Ohio Traction & Light Company?
A. No, sir.
Q. Is all of the stock of the Canton-Akron Consolidated Railroad Company owned by the owners of the Northern Ohio Traction and Light Company?
A. Yes, sir.
Q. So that all these properties taken over, the Canton-Massillon Railway Company, The Canton-Akron Railroad Company,
191 and the Canton-Akron Consolidated Railroad Company——
A. And the New Philadelphia Company also and the Tuscarawas Traction Company.
Q. The stock in those companies all owned by The Northern Ohio Traction & Light Company?
A. Yes, sir.
Q. So that the purchase of the lines from Akron southwardly was made by the Northern Ohio Traction & Light Company from different companies?
A. Yes—that is—now just to modify that statement, these various companies were put in the Canton-Akron Consolidated Railway Company and then turned over to the Northern Ohio Traction & Light Company.
Q. Since the properties were purchased in 1906 the original companies do not operate any parts of the line?
A. No, sir.
Q. Whatever operation of the lines takes place is done by The Northern Ohio Traction & Light Company?
A. Yes, sir.
Q. Now, you say there could be no through service if this Canton-Massillon line were out?
A. It would simply cut that service in two.
Q. There could be no through service if the Canton lines were out, isn't that true?

A. No, sir, that is true.

Q. Your company hasn't a perpetual franchise in the city of Canton, has it?

A. No, sir.

192 Q. There could be no through service if the lines in the city of Akron were cut out, that is, your company did not have a franchise over any city lines there could not be through service?

A. Yes.

Q. How?

A. Over our private right of way.

Q. So you could have a line from here to Massillon by private right of way, could you not?

A. We could.

Q. You have surveyed for a private right of way for that line?

A. Yes.

Q. For what purpose was that survey made?

A. For the purpose of making an estimate on a private right of way to see what it would cost to build the line.

Q. So you could still have through service from Cleveland to Urichsville even if you were off the Canton-Massillon road?

A. By private right of way.

Q. You have no perpetual franchise in the city of Massillon?

A. No, sir.

Q. And your line goes right through the city of Massillon?

A. Yes, sir.

Q. Counsel remarks it is too perpetual in Massillon, it is not too perpetual for your through line is it?

A. No, sir.

Q. You always want a through line through Massillon?

A. Certainly.

Q. So each one of these cities that your lines go through, this through line from Cleveland to Urichsville, you haven't a perpetual franchise on any one of them, have you?

A. No, sir, we have not.

193 Q. Now, the capital stock of the Northern Ohio Traction & Light Company is about nine million dollars, isn't it?

A. Yes.

Q. Issued?

A. Nine million.

Q. About $2,824,000 preferred stock?

A. That was as on the first of January.

Q. First of January of this year?

A. Yes, sir.

Q. You had outstanding bonds on the whole line of over ten million dollars?

A. Yes.

Q. Do you know what was paid by the Northern Ohio Traction & Light Company for the properties that were turned over by the Canton-Akron Consolidated Railroad Company?

A. I can't say off-hand; the conveyances would probably show that.

Q. Now, as a matter of fact, Mr. Currie, isn't it true that the common stock of the Northern Ohio Traction & Light Company is watered?

A. No, sir, it is not watered.

Q. You say it is not watered?

A. I say it is not watered.

Q. How much of it is watered?

(Defendant objects; objection overruled; defendant excepts.)

A. I can't say how much is watered, if any, but I know it isn't all watered.

Q. A considerable portion of the common stock of the Northern Ohio Traction Company is watered?

A. Are you speaking as of this date or what date?

Q. No, as of the original organization and issue?

A. That is in 1903, you mean when the Northern Ohio
194 Traction Company was organized or as of this date?

Q. Go back to the beginning, you say the Northern Ohio Traction Company was organized in 1903?

A. 1903.

Q. What properties did it take over at that time?

A. It took over the property of the Northern Ohio Traction Company.

Q. What did that consist of?

A. That consisted of the A. B. C., the Akron city lines, the light and power in Akron, light and power of Barberton, and the line operating from Ravenna to Wadsworth.

Q. You know what capital stock was issued at that time?

A. Well, it was the combined capital stock of the various roads comprising the Northern Ohio Traction Company; for instance, the A. B. C. Railroad Company had a separate stock issue; the Akron Construction and Electric Company had a separate stock issue; the Akron Rapid Transit Company had a separate stock issue; and the Electric Light & Power Company had a separate issue; so that the combined stock issues of these companies made up the Northern Ohio Traction Company, and then the Northern Ohio Traction & Light Company took over the Northern Ohio Traction.

Q. Do you know what that total was?

A. I can't say.

Q. All these various properties were bonded at that time were they not?

A. Yes—I beg pardon, with the exception of the Akron Rapid Transit Company, there were no bonds, that was stock.

195 Q. Do you recall the amount of that stock?

A. I can't remember.

Q. Now, do you recall the amount of bonds against the company at that time?

A. No, sir, I could not.

Q. After the taking over of the properties of the Northern Ohio Traction & Light Company to which you have referred, was there an issue of stock on the Northern Ohio Traction & Light Company?

A. Yes.
Q. Common stock?
A. Yes, sir, new stock was issued at that time.
Q. Common stock in the Northern Ohio Traction & Light Company were issued to the stockholders of these various companies?
A. Yes, sir, for their pro rata of their holdings in the other companies.
Q. Did the Northern Ohio Traction & Light Company issue bonds at that time?
A. They did.
Q. You know the amount?
A. The statement will show that, Mr. Pontius; I can't recollect the exact amount; this shows it as of January 1; you have $3,400,000 as of January 1 of this year.
Q. Upon those old properties, those properties taken over by the Northern Ohio Traction & Light Company?
A. And the additional bonds that have been sold since 1903.
Q. On these various properties?
A. No, on the Northern Ohio Traction Company; you see bonds have been increasing each year, as improvements are made a bond issue is made.

196 Q. Now, a great deal of that stock that was issued and outstanding by those original companies and for which the Northern Ohio Traction common stock was issued was watered stock, was it not?

(Defendant objects.)
A. No, sir, it was not watered stock.
Q. Those traction lines were built by the money that was raised by the sale of bonds?
A. And stock.
Q. And the sale of stock?
A. Yes, sir.
Q. Did you have anything to do with any of those companies before the Northern Ohio Traction & Light Company was organized?
A. Yes, sir; I was with the Northern Ohio Traction Company first and then later with the Northern Ohio Traction & Light Company.
Q. Were you familiar with the amount of stock that was issued by the old company, that the company had issued at the time the Northern Ohio Traction & Light Company took it over?
A. I think it issued four million of stock.
Q. Four million of stock?
A. Yes.
Q. How much bonds?
A. I can't say.
Q. Practically the same amount wasn't it?
A. Probably the same amount of bonds, I think you are right.
Q. You are one of the incorporators of the Northern Ohio Traction Company?
A. I wasn't personally, no.
Q. But you were manager of that company?

A. Yes, sir.

Q. Don't you know, Mr. Currie, that all the common stock
197 of that company at the time it was issued and before it was taken over by the Northern Ohio Traction & Light Company was what was commonly known as watered stock?

A. No, sir.

Q. There wasn't a dollar paid into the treasury of that company for that common stock?

A. It is not so.

Q. How much was paid in?

A. I just got through telling you that the stockholders of the A. B. & C. Railroad Company and the Akron Rapid Transit Company and the Light & Power Company, and those various properties, that the stock was exchanged for their stock; for instance—I don't know whether they had paid for their stock or not when you go back to othe old company, but their stock was turned over to the Northern Ohio Traction & Light Company and the Northern Ohio Traction & Light Company give stock for their holdings.

Q. We misunderstand each other. I thought you said you was with the Northern Ohio Traction Company?

A. I was.

Q. Before these companies were combined?

A. Yes I was.

Q. I was asking you about the common stock of the Northern Ohio Traction Company, not the Northern Ohio Traction & Light Company, the original company is what I was inquiring about?

A. I presume there was about four millions, as near as I can recollect.

Q. Now, wasn't all that stock, four million of common stock watered, what we know as watered stock?

A. No, sir.

198 Q. Do you know how much bonds they had?

A. I presume they had the bonds to the amount of stock, if the stock was four million the bonds were about four million.

Q. Wasn't that road that was owned by the Northern Ohio Traction Company built entirely by the proceeds realized from the sale of bonds?

A. No, sir.

Q. How do you know that?

A. Because we had a preferred stock issue of the Northern Ohio Traction & Light Company, that I know was paid for one hundred cents on the dollar, the stockholders paid one hundred cents on the dollar.

Q. You are talking about the preferred stock?

A. Well, that is included, I know of my own knowledge.

Q. Of the Northern Ohio Traction Company?

A. Yes.

Q. You said there was about four million of stock?

A. Yes.

Q. Some of that preferred and some common?

A. Yes, sir, I think there was three million common and one million preferred.

Q. In addition to the preferred there were four million of bonds, as you recall?

A. Yes.

Q. Now, wasn't all the common stock in that company watered stock?

A. No, sir; I just got through saying that the stock issue of the Northern Ohio Traction Company was turned over to the stockholders of these various other companies that I enumerated in payment for their stock; now, what they had in their company's I don't know; they turned over their properties to us.

199 Q. To the Northern Ohio Traction Company?

A. Yes, for our stock, so that we simply purchased their stock with our stock; so you can't call that "watered" stock; in other words, we were getting value by acquiring these properties with issued stock.

Q. Then the Northern Ohio Traction Company was a company that was organized and did take over the A. B. C. line, that is known as the Akron——

A. Akron, Bedford and Cleveland.

Q. Akron city line?

A. Akron city line.

Q. Line from Akron to Barberton?

A. From Akron to Barberton over the Wadsworth and Ravenna; it was from Ravenna to Barberton; the Akron city lines, the Light & Power and the A. B. C.

Q. Were you with any of those original companies?

A. No, I wasn't connected with any of them.

Q. You came first into this matter by being connected with the Northern Ohio Traction Company?

A. Yes, sir.

Q. The Northern Ohio Traction & Light Company was organized at what time?

A. I think that was in 1903.

Q. And the Northern Ohio Traction Company gave to the holders of stock in these various companies that it bought stock in the Northern Ohio Traction company?

A. In the Northern Ohio Traction & Light Company; when the Northern Ohio Traction & Light Company acquired the property they had a further issuance of stock in which they gave Northern Ohio Traction & Light Company stock.

200 Q. You know the capital stock of the Canton-Massillon Electric Railway Company?

A. I think it was a million dollars capital stock.

Q. You know who owns that now?

A. Everything is held by The Northern Ohio Traction & Light Company.

Q. At the time the Northern Ohio Traction & Light Company took over the various properties they did take over in 1906 do you know the amount of issued stock at that time?

A. I couldn't say that off-hand without looking it up.

Q. Has there been any stock issued by the Northern Ohio Traction & Light Company since 1906, common stock I mean?

A. No, sir.

Q. There has not?

A. Let me see—since 1906—I think not since 1906.

Q. In the early building of interurban lines in the State of Ohio, I want to ask you this question, Mr. Currie, if you know, whether it isn't a fact that interurban lines, especially in this state, were built wholly from the proceeds of sale of bonds?

(Defendant objects; objection overruled; defendant excepts.)

A. They were built from the sale of bonds and the discount taken care by the stockholders.

Q. They were largely built from the proceeds realized from the sale of bonds?

A. Of course I only know about the roads that I have been connected with.

Q. Do you know anything about the A. B. C. line, how that was built?

A. No, sir, I do not.

201 Q. You know anything about the Ravenna to Kent line, how it was built?

A. Yes.

Q. How was that done, how was the money raised for that?

A. By the sale of securities.

Q. What kind of securities?

A. Bonds.

Q. Any stock?

A. No; it is all under Northern Ohio Traction & Light Company stock.

Q. When was the Ravenna to Kent line built?

A. In 1902 or 1903, I am not sure which year, I think it was in 1902.

Q. That was before the organization of the Northern Ohio Traction and Light Company?

A. Yes, sir.

Q. That was done by the Northern Ohio Traction Company?

A. Yes.

Q. You say that that company sold securities, by that you mean bonds?

A. Yes sir, bonds.

Q. Still outstanding?

A. Still outstanding, that is in the general issue of bonds; for instance, in improvements that are made from year to year are made out of the sale of securities.

Q. Was there a separate company organized for the construction of that Ravenna line?

A. No, sir.

Q. Do you know whether those securities, bonds were sold at par or less than par?

A. I can't say; just depends on the money market what you can sell your bonds at.

Q. Is there any record in the office of the Northern Ohio Traction & Light Company that will show the amount received from the sale of bonds by the company since its organization?

A. Yes, sir.

202 Q. Who has charge of those records?

A. Mr. Lahr, the auditor.

Q. Those books located at Akron?

A. Yes, sir.

Q. What is Mr. Lahr's first name, is he the gentleman that was here yesterday?

A. He is the gentleman that was here yesterday.

Q. Do those records show the amount received from the sale of stock?

A. I presume they will, yes.

Q. Now, this interurban railway between Canton and Massillon was built in 1892, you know that?

A. I do not.

Q. You were informed that was when it was built?

A. I was informed that is when it was built.

Q. A distance of about five miles, five and a half?

A. About five and a half miles, yes.

Q. Common stock was a million dollars, you say?

A. Yes, sir.

Q. And there was $850,000 of first mortgage bonds issued by that company?

A. Yes, sir.

Q. What is your opinion, Mr. Currie, as a street car man, traction man, as to whether or not the building of that line the distance it was and the kind of line it was, cost $850,000?

A. Its issue of bonds and stock consisted of Canton-Massillon Electric, composed of the entire Canton-Massillon Electric; you had your city of Canton, you have your Canton-Massillon, you have your line to Massillon and your Massilon city lines in that issue.

Q. So that the issue of $850,000 of bonds that the company pleads in its answer covers not only this Canton-Massillon line but

203 covers the city line of Canton and city lines of Massillon?

A. I can't say that; I don't know that; I don't know exactly what these bonds do cover; but I do say that the Canton-Massillon Electric was composed of these lines I speak of; this particular $850,000 bond issue may be on that line for all I know.

Q. What do you say as a traction man as to the cost of building a line from Lake Junction of Canton into the center of Massillon such as this Canton-Massillon line was when you got it?

A. You mean building the tracks exclusively, or building the entire thing, power house and equipment?

Q. Building tracks?

A. Five and a half miles would cost you about $225,000.

Q. About $225,000 for trackage?

A. Yes.

Q. Now, it wouldn't be a difficult matter to build your line on a private right of way from the western limits of the city of Canton to the eastern limits of the city of Massillon, would it, Mr. Currie?

A. It wouldn't be a very difficult thing to do if we had the right of way.

Q. Your company has the right to appropriate land for a right of way, hasn't it?

A. Yes, sir, we do.

Q. Your lines run from Cleveland to Dennison and have a trackage of over 225 miles, haven't you?

A. Yes, sir, 235 miles.

Q. And all the cars are run and operated from two power houses, isn't that true, at this time?

A. Two main power houses and a number of sub-stations.

204 Q. There is no power house or sub-station located on the line of the Northern Ohio Traction & Light Company between the western limits of the city of Canton and the eastern limits of the city of Massillon, is there?

A. No, sir, not between those points, but there is one just at Massillon, as we enter Massillon.

Q. In the city of Massillon?

A. Yes, just at the terminus of the Canton-Massillon.

Q. That is a sub-station?

A. That is a sub-station.

Q. Was there ever, to your knowledge, a power house erected and power used from that house exclusively for this line on the Canton-Massillon road?

A. You are now alluding to the five and a half miles?

Q. Yes.

A. I don't know.

Q. You never heard of any?

A. I never heard of any.

Q. Now, when the Northern Ohio Traction & Light Company took over this Canton-Massillon Electric Railroad Company they issued stock for the common stock held by the stockholders of that company?

A. Yes, sir, I think they did.

Q. Equal amounts just exchanged?

A. I think it is true.

Q. So that if there was outstanding from the Canton-Massillon Electric Railroad Company a million dollars of common stock at the time the Northern Ohio Traction & Light Company took it, you issued to them a million dollars of that stock?

A. Well, now, the conveyances will show that deal; I

205 don't like to testify to something I am not positive about; the conveyances will show that, but there was an exchange of stock in some way.

Q. Whatever payment there was to the stockholders in the Canton-Massillon Electric Railroad Company was made in stock and not in money?

A. Not exclusively.

Q. And would the conveyances show this?
A. The conveyance will show that there was a money consideration besides the exchange of stock, there was certain differences between our stock and the stock of the Canton-Akron Consolidated Railroad, and whatever the difference was, we had to put up in cash.
Q. Where is this, do you know?
A. I suppose it is in our records.
Q. Who would have possession of that?
A. Mr. Lahr.
Q. Mr. Lahr, the auditor
A. Yes, sir.

That is all.

And the hour of adjournment having arrived the further hearing of this cause is adjourned to one o'clock, p. m. of the same day and date.

206 JAMES D. BARRY, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welty:

Q. Mr. Barry, you live at Reedurban, do you not?
A. No, sir, I do not; I have been living part of the time in the city and part of the time at Mt. Marie.
Q. Mr. Barry, you are in the real estate business, I believe?
A. Yes, sir.
Q. How long have you lived in the city of Canton?
A. About 48 years.
Q. You remember the time the Canton-Massillon Interurban Railway was constructed, you remember that circumstance?
A. Yes, sir.
Q. Have you lived in the city of Canton ever since that time?
A. Yes, sir.
Q. About what is the population of Massillon?
A. I think about seventeen or eighteen thousand.
Q. About what is the population of Canton
A. About sixty thousand.
Q. How is it between the limits of the two cities on the Canton-Massillon road with reference to buildings at the present time, or how was it at the time this railroad was built and how is it now?
A. Oh, there is possibly five or six times more houses now than there was at that time, possibly more.
Q. Since that railroad was built I believe Reedurban has been platted?

207 (Relator objects; objection overruled; relator excepts.)

A. Yes, sir.
Q. And lots sold?
A. Yes, sir.

Q. I will ask you whether or not you bought some land upon the Canton-Massillon road?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.
Q. When was that, Mr. Barry?

(Relator objects; objection overruled; relator excepts.)

A. Well, it was close to five years ago the first of this last April.
Q. Where was the land situate and about how much frontage had it on the Canton-Massillon road?

(Relator objects; objection overruled; relator excepts.)

A. It was from what is known as Freeman or Richville Road at Reedurban east about 2800 feet on the north side of the road.
Q. Did you allot it?
A. Yes, sir.
Q. Into how many allotments?

(Relator objects; objection overruled; relator excepts.)

A. 51 tracts.
Q. How many of them were sold?

(Relator objects; objection overruled; relator excepts.)

A. 47.
208 Q. You have built a house out there?
A. Yes, sir.
Q And a number of houses have been built upon your addition?
A. Yes, sir.
Q. Do you know the Mt. Marie College?
A. Yes, sir.
Q. That, I believe, is south of your house on the opposite side of the road?
A. Yes, immediately south.
Q. Do you know how many acres of land they have in that college?

(Relator objects; objection overruled; relator excepts.)

A. Sixty-three.
Q About how much frontage have they on the Massillon road?

(Relator objects; objection overruled; relator excepts.)

A. About eighteen hundred feet.
Q. Do you know when that college, when the building was built?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir; I don't know exact, it was built six or seven years ago, they were about a year in building it.
Q. What kind of a structure is it?

(Relator objects; objection overruled; relator excepts.)

A. Stone.
Q. How many stories in it?

A. Five besides the basement.
209 Q. Five story stone building?
A. Yes.
Q. Do you know the size of the present building, or about?
A. No, I do not.
Q. Are there children going to and from that school?

(Relator objects; objection overruled; relator excepts.)

A. Yes.
Q. Have been ever since it was opened?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.
Q. Is there any other way of the children getting to and from that school aside from walking from the city limits, that is, any other railroad other than the electric road?

(Relator objects; objection overruled; relator excepts.)

A. No, sir.
Q. Are many of those children day students going back and forth to Canton?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir, the larger part of them.
Q. About how many students have they there?
A. Well, they usually have about 50 to 60 boarders and probably 50 to 75 day scholars that come from Canton and Massillon, and possibly from 100 to 150 art and music scholars that come there.
Q. From Canton and Massillon and around?
A. Yes.
210 Q. There is a station there called "Mt. Marie?"
A. Yes, sir.
Q. How far is that from the public square in Canton?
A. The school?
Q. Yes.
A. It is about 3⅝ miles.
Q. How far is it from the city limits of Canton?
A. About a mile and a half.
Q. How far is it from Massillon?
A. To the school?
Q. Yes.
A. It is about 4⅜ miles.
Q. About how many of those day scholars going to that school come from Massillon how many of the music and art scholars come from Massillon?
A. Well, I would be unable to answer that; there is quite a number of day scholars comes from Massillon.
Q. What proportion would it be, perhaps?
A. Well, it looks as though possibly 2/5 come from Massillon, at least that is the way I noticed the larger per cent.; prior to this year the percentage wasn't so large.

Q. Would the Massillon scholars have any way of getting there by an electric railroad if this road was removed from the Canton-Massillon road?

A. No, sir.

Q. Mr. Barry, I will ask you whether or not the fact that the electric railroad was located on the Canton-Massillon road was or was not one of the inducements that lead you to purchase that property and allot it and build your home?

(Relator objects; objection overruled; relator excepts.)

211 A. Yes, sir.

Q. What effect, in your judgment, would it have upon the lands adjoining and abutting the highway between Canton and Massillon to remove the electric road from the highway?

(Relator objects; objection overruled; relator excepts.)

A. Oh, it would depreciate it fifty or sixty per cent.

Q. Depreciate it?

A. Yes, sir.

Q. You may state, Mr. Barry, if you have observed how the travel is between Canton and Massillon upon this electric road as to being a large number or few in number?

(Relator objects; objection overruled; relator excepts.)

A. It is very large, in my judgment.

Q. Are there any new buildings being erected along the Canton-Massillon road between the limits of the two cities now?

(Relator objects; objection overruled; relator excepts.)

A. Well, there is a few, not many.

Q. Has Mr. Rommel completed his?

A. Yes.

Q. That is a very expensive building?

A. Yes, sir, cost probably $30,000 or $35,000.

Q. Just completed?

A. Yes, sir.

(Relator moves the court that the testimony of Mr. Barry and each and every question and answer therein be stricken from the record on the ground that it is incompetent and irrelevant to the issue; motion overruled; relator excepts.)

212 Cross-examination.

By Mr. Sweitzer:

Q. Now, Mr. Barry, you say that you live on this Canton-Massillon electric line?

A. Yes.

Q. You have lived there how long?

A. Three years.

Q. And your property, I believe you testified, was more valuable because of that line?

A. Yes, sir, certainly was.

Q. You don't mean to say that it is more valuable because the Northern Ohio Traction & Light Company owns the line, do you?

A. It is more valuable because there is a street car line there, I don't care who owns it.

Q. No difference who owned the line or who had a line there?

A. No.

Q. Your property would be just as valuable?

A. With a street car line.

Q. That is, if the Ohio Central or any other line owned that it would be just as valuable, wouldn't it?

A. I imagine so if they gave us the same service; it would depend somewhat on that.

Q. If the Northern Ohio Traction Company were to remove and there were to be another line there by some other company it wouldn't in any way diminish the value of your property, would it?

A. No, that wouldn't diminish it but I don't believe that will ever occur.

Q. We are not asking you whether it will or not, somebody else will decide that: that wouldn't diminish the value of your place then?

A. No, sir.

213 Q. And it would not diminish the value of any other property along that line, would it?

A. No, sir.

Q. And it is the mere fact that an electric line being there that you refer to in your testimony?

A. Well, no, the fact that this line is there in conjunction with other lines is what makes it valuable.

Q. Suppose there were some other line that extended from Massillon to Canton, would it then diminish the value of your place, this same line owned by some other company?

A. I believe it would; I don't believe you would have as good service because there wouldn't be such a demand for cars.

Q. You don't believe any other company could run the line as successfully as the Northern Ohio Traction Company, is that it?

A. Not in conjunction with other lines, they naturally would give better service.

Q. The mere fact that this line were owned by somebody else, or somebody else had a line over that territory would not affect the coming to and from this college or seminary that you talk about, would it?

A. No, no.

Q. Now, what is the rate from that station that you take at Mt. Marie, I believe you call the station, the stop at the school, Mt. Marie station?

A. Yes.

Q. To the city of Canton?

A. The cash fare is ten cents.

Q. And from there to the city of Massillon?

A. I don't know that I ever paid cash fare; I don't know
214 that I ever had occasion to go from there to Massillon.

Q. Do you know what the rate is?

A. The rate is 25 cents a round trip; when I go to Massillon, I usually go from here to Massillon.

Q. How much one way?

A. Fifteen cents.

Q. Suppose a line were there where the rate were less than that, lower than this rate you have given, it would make property still more valuable along there, wouldn't it?

A. It would be better, yes, sir, if the services was just as good and and evening and not give very much service.

Q. If the service was as good and the rates less?

A. It would be better, yes, sir, if the services was just as good and the rate less.

Q. It would be just as valuable?

A. Yes, sir.

Redirect examination.

By Mr. Welty:

Q. Mr. Barry, on cross-examination you were inquired of the difference to the property owners along that line of this company operating the line and some other company that did not have connections, you may state whether or not you now have through service on this line to different points, to Akron and New Philadelphia, both north and south?

A. Yes, sir, we have to all points.

Q. Now, you might explain a little more fully what you mean, what benefits there are to the property owners along that line because of this company that owns the property below and
215 above, being more valuable to you than an independent line?

A. Well, the fact that there is more people using the line south of Massillon and also north of Canton, naturally the traffic would be greater between those two points, and the result of that would be you would have more cars and closer time, I believe you would have all the cars you could run on that line with a single track and that is very desirable to anybody living on the road.

Q. Is there any advantage in that being connected with the city lines, suppose the same company owns the city lines?

A. Well, I think it is an advantage so far as that is concerned, the lines all being owned by one company, I think that is an advantage to the patrons because of convenience and arranging of schedules and transfers, etc., connections.

Q. The students to that college are part of them from south of Massillon and other north of Canton?

(Relator objects; objection overruled; relator excepts.)

A. Yes, there is some from Navarre, there are several every year, there is some there now from Navarre, I don't know as there is any below that, but I do know from Navarre.

Q. And there is some from north of Canton, is there not?

(Relator objects; objection overruled; relator excepts.)

A. Yes, there is some north of Canton also.

216 Recross-examination.

By Mr. Sweitzer:

Q. Now, Mr. Barry, do the limited cars stop out there at your station, Mt. Marie?

A. Yes, sir.

Q. You said you got transfers on the city lines here when you came in?

A. No, sir, I did not.

Q. What did you say about that?

A. I said the convenience of transfers and a schedule of close connections from both ends.

Q. These limited cars stop at any point between Canton and Massillon, you know?

A. No, I don't think they do; I never took enough time to look that over.

Q. The only point you know they stop at is Mt. Marie?

A. Yes, I know they stop there.

Q. You say you can't get transfers on the city line here in Canton from the interurban cars, is that right?

A. No, you can.

Q. You mean that a man coming in on the interurban line from the west, the Canton-Massillon line is entitled, and if he wants it, gets a transfer on the city lines here without extra payment?

A. Yes, sir, of fare.

Q. You know that to be the general practice of that company?

A. I don't know, that term, "general" what you mean to imply by that, I know that is true though, that you can do it.

Q. You know you get them?

A. Anybody can.

Q. How do you know anybody can get them?

A. I see them getting them.

217 Q. And you do when you get on the Canton-Massillon car here, pay your fare into Canton, then without the payment of any additional money you get a transfer on the city line here, did you?

A. No, sir.

Q. You understand that?

A. You asked me if they issued transfers off of that interurban line and I say yes.

Q. On a city line?

A. Yes, sir.

Q. Without the payment of fare?

A. Yes, sir.

Q. And if they do that why don't you get it?

A. I have no occasion to use any.

Q. How do you know that other people got them?
A. I see them every day.
Q. Without the payment of extra fare?
A. Yes.
Q. Who are those people? The traveling public?
A. Well, anybody that is entitled to them and ask for them they get them; that is all I know; I see that very frequent there isn't hardly a car that I come in on that I don't see that occur; you can also get a transfer going out on a city line.
Q. Where must they get on this car in order to get a transfer?
A. I don't know, I never inquired; but I know they issue those transfers.
Q. You mean to say to the court that you know that to be done almost every day and you know it of your own knowledge?
A. Yes.
Q. People getting on the Canton-Massillon line, paying their fare on that line to the city of Canton, without the payment of any other fare get a transfer, say on the North Cleveland avenue line, Mahoning line, East Tuscarawas line or city cars?
A. Yes.
218 Q. You know that of your own knowledge?
A. Yes, sir.
Q. You said something about these students getting transfers, where do they get their transfers?
A. I didn't specify students.
Q. Well, do you know anything about the rates to them?
A. Yes.
Q. What is that rate in comparison with the rates to other people?
A. They get a rate of five cents to the public square, I think.
Q. That is, there is a rate given to them that isn't given to the traveling public, is that right?
A. Well, they have; they get 60 tickets, they have that permission also to buy a book of tickets.
Q. When they want transfers they have to go into the office to get them, they can't get them on the cars, they have to go to the office to get them, to get a transfer from the interurban to the city line?
A. No, no; I don't understand you?
Q. Suppose they had a ticket on an interurban line, how do they get their transfer to the city line without additional pay?
A. Anybody that is entitled to it gets it from the conductor.
Q. You know that to be true of the students, you swear here of your own knowledge?
A. No, I never specified the students got any transfers.
Q. Do you know anything about it?
A. No, I don't believe they get any transfers.
Q. You don't think they get any transfers.
A. No, I don't think so.
219 Q. Now, you testified concerning that school, are you connected with it in any way, the administration of it?
A. No, sir.

Q. Then all you know about it is from observation and living near there, is it?

A. Yes, in a general way.

That is all.

JOSEPH DICK, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welty:

Q. Mr. Dick, you live here in the city?

A. Yes, sir.

Q. You live in Canton?

A. Yes, sir.

Q. You are the Joseph Dick, proprietor of the Dick Manufacturing Company?

A. Yes, sir.

Q. You live, I believe, on West Tuscarawas street in Canton?

A. Yes, sir.

Q. The road from Canton, public highway from Canton to Massillon from the public squares of both cities passes your house?

A. Yes, sir.

Q. I believe that is the Lincoln Highway now?

A. Supposed to be.

Q. Mr. Dick, how long have you lived in the city of Canton?

A. About sixty years.

Q. And your manufacturing plant is situated on West Tuscarawas street, Canton?

A. Yes, sir.

Q. Same street as your residence is?

A. Yes, sir.

220 Q. Did you know Mr. William Lynch in his lifetime?

A. Yes, sir.

Q. Do you remember the occasion of the building of the interurban road between Massillon and Canton?

A. Yes, sir.

Q. What was the condition of the country at that time between the two towns with reference to houses, improvements, etc.?

(Relator objects because of its immateriality; objection overruled; relator excepts.)

Counsel for Relator: May the record show an objection and exception to all this line of testimony?

Master Commissioner: It may so show.

A. It was very crude compared to what it is now.

Q. Are there more buildings along that road now than there was then?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

Q. Mr. Dick, you know where the Mt. Marie College is located?
A. Yes, sir.
Q. And you, I believe, made the purchase of the land for them?
A. Yes, sir.
Q. Do you know how much an acre that land was sold for?

(Relator objects; objection overruled; relator excepts.)

A. $450.
Q. How many acres?
A. About 63.
Q. That has a frontage on the Canton-Massillon road?
A. Yes, some 1700 or 1800 feet.
221 Q. What kind of a building has been placed on that?
A. Stone.
Q. Five story building?
A. Yes, sir.
Q. Now, I will ask you, Mr. Dick, whether children going to and from that school have any other means of access by electric railway except the one on the Canton-Massillon road?

(Relator objects; objection overruled; relator excepts.)

A. No, sir.
Q. In the locating of that college upon that highway did the fact that an electric railway was upon that highway have anything to do with it?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.
Q. Would you have located it there had it been that there would have been no railroad there?

(Relator objects; objection overruled; relator excepts.)

A. No, sir.
Q. What effect, in your judgment, Mr. Dick, would it have on that college and school, its property and attendance, etc., if the electric railway were removed from the highway?

(Relator objects; objection overruled; relator excepts.)

A. It would be very detrimental.
Q. What effect would it have on property generally between Massillon and Canton along that road if the electric railway was removed?

222 (Relator objects; objection overruled; relator excepts.)

A. I suppose it would depreciate in value.
Q. You may state, Mr. Dick, whether or not the road has been continuously operated ever since Mr. Lynch and his company, the Canton-Massillon Electric Railway Company, built it?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

Q. Mr. Dick, your manufacturing plant adjoins on the east side the power plant of the present company?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

Q. That power plant, I believe, was built by the Canton-Akron Railway Company?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

Q. You may state in a general way what kind of a plant it is, whether large or small.

(Relator objects; objection overruled; relator excepts.)

A. It is quite extensive.

Q. Was that built after Mr. Lynch and the Canton-Massillon sold out to the Canton-Akron?

(Relator objects; objection overruled; relator excepts.)

A. Yes, sir.

223 (Relator moves that the testimony of Mr. Dick and each and every answer constituting it, be stricken out on the ground that it is irrelevant and incompetent to the issue; motion overruled; relator excepts.)

Cross-examination.

By Mr. Sweitzer:

Q. Now, you say, Mr. Dick, that there being a railroad, an electric railway on the Canton-Massillon road had something to do with locating the college on it and the removing of that electric road would in a measure depreciate the value of that college?

A. Yes, sir.

Q. Now, the mere ownership of that road would have nothing to do with the value of that college, would it?

A. Not as long as service was maintained.

Q. The particular company owning it would have absolutely nothing to do with it?

A. No, sir.

Q. That is, if the property belonging to the Northern Ohio Traction & Light Company were removed and property of some other railroad that would give just as good service as they do were put down in its place, would not interfere in any way with your college?

A. No, sir.

Q. In locating it there you paid no attention to the fact that that road was owned and controlled by the Northern Ohio Traction & Light Company?

A. No, sir.

Q. It was merely the road itself?

A. Yes, sir.

224 Redirect examination.

By Mr. Welty:

Q. You may state, Mr. Dick, what kind of service has been given?

(Relator objects; objection overruled; relator excepts.)

A. The service has been very good, very satisfactory.

Q. What effect, Mr. Dick, would it have upon that property, suppose the line between the two cities was operated by an independent company or operated by a company that owned and operated the city lines and the interurban lines between Cleveland and New Philadelphia, which operation, would in your judgment, be of the most benefit to the people living upon the line and the college there?

(Relator objects; objection overruled; relator excepts.)

A. I don't know that I get your question exactly.

Q. Suppose you take two situations, one, a company operating an electric railway on the Canton-Massillon road, simply between the corporation limits of the two cities; now, take another company that owned and operated an electric line through there that owned the city lines in Canton and Massillon and the interurban lines, as the Northern Ohio Traction & Light Company do now, which would be the most benefit to the schools and the property out there?

225 (Relator objects; objection overruled; relator excepts.)

A. There wouldnt be any if the rates and all that were the same, and conditions were the same.

Q. And the connections were the same?

A. Yes.

Q. Suppose you run it just from one city line to the other?

(Relator objects; objection overruled; relator excepts.)

A. It would make a difference.

(Relator moves the court to strike out the testimony of the witness given on redirect examination; motion overruled; relator excepts.)

Recross-examination.

By Mr. Sweitzer:

Q. But suppose the company that were operating the Canton-Massillon line were giving better service and more extensions and running more cars and better cars that still would be to the advantage of the institution, wouldn't it?

A. Yes, sir.

That is all.

W. H. HOOVER, to further maintain the issue on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welty:

Q. Mr. Hoover, you are the W. H. Hoover of the W. H. Hoover Company of New Berlin?

A. Yes, sir.

Q. You was president of the Canton-Akron Railway Company in 1902, wasn't you?

A. I was.

226 Q. Were you familiar in a general way with the properties of the Canton-Massillon Electric Railroad at about the time the Canton-Akron Railway Company purchased them?

A. I was.

Q. You had occasion to go over them and know them?

A. Yes.

Q. You were one of the directors of the Canton-Akron at the time the purchase was made by the Canton-Akron?

A. Yes, sir.

Q. I show you now, Mr. Hoover, a book entitled "The Canton-Akron Railway Company Record" and ask you to look at the signature of the chairman of the stockholders' meeting held June 17, 1902, and found on pages from 146 to 149 inclusive, of the book and state whether or not that is your signature as chairman?

A. It is.

Q. You know Mr. Eldridge's signature?

A. I do.

Q. Is that Mr. Eldridge's signature?

A. Yes, sir.

Q. State whether or not this is the record of the stockholders' meeting.

A. It is.

Defendant offers in evidence pages containing so much of the stockholders' meeting of June 17, 1902, as is contained on page 146 and the upper half of 147.

(Relator objects; objection overruled; relator excepts.)

It is stipulated between counsel that instead of the original record being introduced that part of the minutes offered may be read into the record and used as the original minutes as

227 though the book of original minutes were introduced. Subject, however, to relator's objection heretofore made as to materiality.

"Pursuant to the foregoing notice meeting of the stockholders of the Canton-Akron Railway Company was held at the office of the company in the city of Canton, Ohio, June 17, 1902, at 1:30 p. m. There were present in person or by proxy the following stockholders representing the entire capital stock: W. H. Hoover, 1 share; Philip L. Saltonstall, 1 share; S. Reed Anthony, by Jeremiah Smith,

Jr., proxy, 3 shares; John C. Welty, 1 share; J. T. Ross, by Jeremiah Smith, Jr., 1 share; Louis E. Myers, 1 share; Chauncey Eldridge, 1 share; C. F. Moore, by Jeremiah Smith, Jr., proxy, 1 share; H. B. McGraw, by Jeremiah Smith, Jr., 1 share; Samuel F. Shannon, by Jeremiah Smith, Jr., proxy, 15,989 shares. On motion of Mr. Myers, Mr. Hoover was elected chairman and Mr. Eldridge secretary of the meeting. The minutes of the previous meeting were read and approved. The following resolution was offered by Mr. Saltonstall: Whereas, The Canton-Massillon Electric Railway Company is organized for street railway purposes, and is operating a street railroad by electric power, extending from Canton to Massillon and from Massillon to Navarre, with a branch line to Myers Lake, all within Stark county, Ohio, and whereas, the location and tracks of said company cannect with the tracks of this compony in the city of Canton; and Whereas, the stockholders of the said The Canton-Massillon Electric
228 Railway Company are willing to sell its property, rights and franchises to this company for the sum of one million dollars, and the assumption by this company of all liabilities of the Canton-Massillon Electric Railway Company, now Therefore, voting that this company purchase all property, real and personal and mixed, of the Canton-Massillon Electric Railway Company, and all the franchises, rights and privileges respecting the use and operation of its railway for the sum of one million dollars, and that the president and treasurer be authorized to execute in the name and behalf of the company and under the corporate seal, an agreement with the Canton-Massillon Electric Railway Company, assuming all obligations and liabilities of said company, and that the treasurer of this company be and hereby is authorized to pay to the treasurer of the Canton-Massillon Electric Railway Company upon the execution and delivery of such deed or deeds that may be requisite to transfer the property above referred to, the sum of one million dollars. Mr. Eldridge and Mr. Smith were appointed tellers. Upon a stock ballot being had it was reported that 16,000 shares voted in favor of the foregoing resolution, none against, and was declared carried."

Q. Mr. Hoover, after that was the road purchased by the Canton-Akron?

A. It was.

Q. In accordance with that resolution?

A. Yes, sir.

Q. Now, Mr. Hoover, I will ask you whether or not you remember after the Canton-Akron purchased the Canton-Massillon
229 Electric Railway Company's property, what improvements were made by the Canton-Akron, if you remember?

(Relator objects; objection overruled; relator excepts.)

Counsel for Relator: We would like to have an objection and exception to all this line of testimony.

Master Commissioner: You may have it.

A. The property was practically rebuilt; new power house; new

car equipment; tracks were improved; the line was generally overhauled and modernized.

Q. How about new cars?

A. Quite a number of new cars purchased.

Q. Both interurban and city?

(Relator objects; objection overruled; relator excepts.)

A. Yes.

Q. How about the power house?

(Relator objects; objection overruled; relator excepts.)

A. New power house was built and located in this city.

Q. That is the one now on West Tuscarawas street?

A. Yes, sir.

Q. Mr. Hoover, I don't know whether you know or not about since the Canton-Akron Railway took over this property that the Catholic cemetery was located between Canton and Massillon?

A. I don't know anything about that.

230 Q. And a switch put in?

A. I don't know anything about that.

(Relator moves that all of the testimony of the witness and each and every answer composing that testimony be stricken from the record; motion overruled; relator excepts.)

Cross-examination.

By Mr. Pontius:

Q. Is the Canton-Akron Railway Company still in existence, Mr. Hoover?

A. Yes, sir.

Q. Is this the only record that you know of of the record of the meetings?

A. At that time?

Q. You still own stock in the Canton-Akron?

A. I do not.

Q. Still an officer of the company?

A. No, sir.

Q. How do you know it is still in existence?

A. Well, I only have a general knowledge of it.

Q. You can't testify to that absolutely?

A. I presume not.

Q. At the time the Canton-Akron Railway Company bought the Canton-Massillon Electric Railway Company's properties, it, that is, the Canton-Akron Railway Company, operated between the square of Canton and Akron?

A. I think we were operating between Canton and Akron at that time; it was about that time it was opened.

Q. That was the only property the Canton-Akron owned except what it bought from the Canton-Massillon Railway Company?

A. In this community at that time, yes.

231 Q. It didn't own any lines north of Akron?

A. Not at that time.

Q. Or the Akron city lines?
A. Not at that time.
Q. The Canton-Akron Railway Company never owned the Akron city lines?
A. No, sir.
Q. Or the lines running northwardly from Akron to Cleveland?
A. No, sir.
Q. And the company of which you were president, The Canton-Akron Company, purchased the Canton city lines together with the line leading to Massillon on to Navarre?
A. Yes, sir.
Q. Navarre being a town about five miles south of Massillon in Stark county?
A. Yes, sir.
Q. Did your company pay one million dollars cash to the stockholders of the Canton-Massillon Electric Railway?
A. The money didn't pass through my hands, but the treasurer was authorized and instructed so to pay.
Q. So that you don't know whether that transaction was completed or not by the payment of cash, do you?
A. I wouldn't swear that that money passed, no.
Q. You were president and a stockholder of the Canton-Akron Railway Company?
A. At the time, yes, sir.
Q. You know whether or not the treasury at the time of the Canton-Massillon Electric Railway Company purchase by the Canton-Akron Railroad Company had a million dollars on hand?
A. I wasn't the treasurer, and that was not my field of work, I couldn't say whether or not they did have.
232 Q. As president of the Canton-Akron Company you had no knowledge that he had a million dollars cash in the treasury?
A. I didn't have knowledge that he had or hadn't, I could not state.
Q. Did you, as a stockholder, contribute any of your own money at that time?
A. A very small amount.
Q. You know how much?
A. I think one hundred dollars.
Q. How many shares did you hold in the Canton-Akron Co.?
A. Just to the amount I paid for.
Q. I mean at the time of the purchase of the Canton-Massillon Railway Company?
A. Just the amount I paid for.
Q. That is paid for in the Canton-Massillon?
A. In the Canton-Akron.
Q. But as a stockholder in the Canton-Akron Railway Company at the time that company bought the Canton-Massillon Electric Railway Company, did you contribute any of your own money into the funds of the Canton-Akron Company for the purpose of buying the Canton-Massillon Company?
A. I did not.

Q. Who was the treasurer of your company at that time?
A. Mr. Saltonstall, as I remember.
Q. He is a man that lives in Boston or some place in the east?
A. Yes, sir.
Q. Your company, the Canton-Akron Company, was later sold to some company, was it not?
A. Yes, sir.
233 Q. That is, the assets of the company were sold?
A. Yes, sir.
Q. To what company, do you remember?
A. The Northern Ohio Traction & Light Company.

That is all.

And the hour of adjournment having arrived the further hearing of this cause is adjourned to 9:30 o'clock Monday morning, May 25, at Akron Ohio, at the offices of the Northern Ohio Traction & Light Company.

CHARLES H. LAHR, being recalled for further cross-examination, testified as follows:

Cross-examination.

By Mr. Pontius:

Q. Mr. Lahr, you as auditor for the defendant company, since the adjournment last week, have looked over the books in the possession of the Northern Ohio Traction & Light Company?
A. I have.
Q. The books of these companies that were bought out by the Northern Ohio Traction & Light Company?
A. Yes, sir.
Q. Namely, the Canton-Massillon Electric Railway Company, the Canton-Akron Railroad Company, and the Canton-Akron Consolidated Railroad Company?
A. Yes, sir.
Q. Were you able to find, Mr. Lahr, the original books of the Canton-Massillon Electric Railway Company showing the cost of the construction of the Canton-Massillon, that is, the interurban railroad between the cities of Canton and Massillon?
A. No.
234 Q. And you do not have those books in your possession?
A. No, sir.
Q. The defendant company does not have the original books showing the cost of the construction of that interurban railroad?
A. No, sir; I have the books here since 1894.
Q. You have the books since 1894?
A. Yes, sir.
Q. But this interurban road between Canton and Massillon was built in 1892, as the record shows, and you have no books covering that year?
A. No, sir.

Q. You have no books showing the entries of the cost of the original construction of that interurban road?

A. No, sir.

Q. Now, have you any knowledge of any bond issues, or do the books that you have in your possession show any bond issues covering the Canton-Massillon Electric Railroad prior to the issue under date of May 1, 1900, and of which amount $850,000 was issued, was there any bond issue so far as you know or do your books show?

A. The first that I have is March 8, 1901, that is the first I can find.

Q. March 8, 1901?

A. Yes, sir.

Q. What was the amount of that bond issue par value?

A. Well, now, that is the first time they sold bonds and that entire issue calls for $850,000.

Q. Do you know whether or not that is the issue dated May 1, 1900, in which the Cleveland Trust Company is made trustee?

A. I think it is.

Q. The first bonds issued to the public under that issue of bonds of May 1, 1900, to the Cleveland Trust Company was on
235 what date?

A. March 8, 1901, they sold five bonds.

Q. Have you gone over the books of the company and are you able to give us the amount of money that the company realized from the sale of the $850,000 issue—I don't care to go into detail of the whole second sale?

A. Yes, I can tell you that.

Q. I wish you would give us the total amount realized by the railroad company?

A. As near as I can figure it out here from the entries, the cash realized on what bonds were sold was $487,150; here is another entry on April 20, 1901, it says "114 bonds of exchange" that is in addition to the $487,150.

Q. Can you tell from your books what they were exchanged for?

A. It doesn't say, and it is carried out $114,000.

Counsel for Defendant: Is that included in the other?

A. No; it is $487,150 and $114,000.

Q. Does it say the number of bonds exchanged?

A. Yes, 114 bonds exchanged, but it doesn't say what for; then there is another entry same date, 215 bonds Canton Street Railway Company and Lakeside Street Railway Company exchanged, $215,000.

Q. Have you any of the books here of the Canton Street Railway Company or Lakeside Street Railway Company, you know of?

A. No; sir; that makes a total of $816,150.

Q. Now, those were sold during a period of years, do your records show? What is the date of the first sale?

A. March 8, 1901, and in March, 1902, it doesn't give any date in March.

236 Q. That is the last sale?

A. Yes.

Q. And there were 850 bonds of $1000 each, issued?

A. Yes, sir.

Q. Now, do your books show whether or not any of those bonds were given with either common or preferred stock of the company?

A. None of them show that they were given; here is something I can read you about the $114,000.

Q. Al- right.

A. It says "For $114,000 bonds, six per cent. Canton-Massillon Electric Railway Company issue of February 1, 1893, exchanged to the Cleveland Trust Company by individual holders for the new five per cent. mortgage bonds of the same company, dated May 1, 1900."

Q. Is there any record showing the 215 bonds?

A. 215 bonds six per cent. Canton Street Railway Company's and Lakeside Street Railroad Company exchanged by individual holders to Cleveland Trust Company for new five per cent. gold mortgage bonds of the Canton-Massillon Electric Company issue of May 1, 1900."

Q. Do the books show whether or not any stock, either common or preferred, was given as bonus with these bonds?

A. Not in the bond entries; I don't find it in the bond entries at all that there was any bonus given.

Q. Well, have you examined the stock entries to see whether or not there was any stock given as bonus with the sale of these bonds or purchase of these bonds?

A. It shows some stock given there.

237 Q. Do you know how much?

(Defendant objects to everything on the issue of stock; objection overruled; defendant excepts.)

A. There is an entry on page 521—

(To this entry and all testimony on the issue of stock, what for, what amount, the defendants objects; objection overruled; defendant excepts.)

Q. That is 581 of records of the old Canton-Massillon Electric Railroad Company?

A. The journal, yes, sir. "The foregoing described stock was issued to owners of the bonds of the Canton Street Railway Company and the Lakeside Street Railroad Company, and the Canton-Massillon Electric Railway Company in consideration of the exchange of their bonds, which bore interest at six per cent. per annum, for the new issue of bonds of the Canton-Massillon Electric Railway Company, dated May 1, 1900, bearing interest at five per cent. per annum. The certificate checks thus are for Canton-Massillon Electric Railway Company six per cent. bonds."

Q. What does the book show as to the number of shares of stock?

A. It must have been 361 shares.

Q. That would be 361 shares at par value would be $361,000?

A. Yes; this might not be considered as a bonus because they

took up a six per cent. bond and gave a five per cent.; then they gave bonds and this stock I suppose to make up the difference.

Q. Does it show the date upon which that stock was issued?

A. February 11, 1901.

238 Q. Was that common stock, do you know, or preferred stock of the Canton-Massillon?

A. It just says "capital stock."

Q. Now, is there any other entry upon the books that you have been able to find showing whether or not stock in the Canton-Massillon Electric Railway Company was given in exchange for bonds or with bonds?

A. One here for services, that is, some stock given for services.

Q. Under what date is that?

A. February 26, 1901.

Q. Does the record of the old Canton-Massillon Electric Railroad Company show that on or about the twenty-sixth of February, 1901, $38,900 worth of stock of the capital stock par value, was given to William A. Lynch for services to the company?

A. Yes, sir.

Q. Is there any other record upon your books as to the giving of stock with the sale of bonds or as a bonus?

A. That is the only thing I can find; ledger A $525,000 I haven't got; that is in ledger A, I haven't got; these two entries you have here is all the entries I can find.

Q. Showing that at the time of the issue of this $850,000 of bonds by the Canton-Massillon Electric Railway Company of which the Cleveland Trust Company was trustee, there was outstanding $600,000 capital stock of the par value of the Canton-Massillon Electric Railway Company?

A. According to the books.

239 Q. Now, have you made an examination of your books relative to whether or not the Canton-Akron Railway Company, which purchased the Canton-Massillon Electric Railway Company exchanged stock for $600,000 of stock issued by the Canton-Massillon Electric Railway Company?

A. Here is the balance brought from the old ledger of the Canton-Akron Railroad Company's Ledger A: Balance from old ledger, $600,000.

Q. "June 17, by 4000 shares of common, $400,000," what does that mean? That on June 17, 1902, 4000 shares of common stock of the Canton-Akron Railway Company was issued?

A. Yes, sir.

Q. That is, the books of the Canton-Akron Railway Company show that on June 1, 1902, it issued 6000 shares of stock

A. That is the balance brought from the old ledger; that is evidently Canton-Massillon stock brought over on to this ledger.

Q. Then on the seventeenth of June, 1902, they issued 4000, making 10,000 shares of the par value of $100 each, or a million dollars' worth of par value of capital stock of Canton-Akron Railway Company issued?

A. Yes, sir; the accounts just simply stand "capital stock."

Counsel for Defendant: It doesn't show what that $600,000 was issued for?

A. No, it shows a balance from the old ledger.

Q. The old ledger was from the old Canton-Massillon Electric railway Company?

A. That is where I assume it came from; I didn't attempt
240 to trace it but that is the same amount, it says "from the old ledger."

Q. Now, do the records of the Canton-Akron Railway Company show what money they realized from the issue of the $600,000 of stock on June 1, 1902, or the issue of $400,000 worth of stock on June 17, 1902?

A. No, sir.

Q. There is nothing in the records to show the receipt of the cash for that stock?

A. No, sir, they take it on their cash book, but it is not cash.

Q. That is, on the old cash book was June 17, 1902, there is this entry "Capital stock 4000 shares common, 6000 shares preferred, total cash, one million dollars."

A. That is the total.

Q. The total one million dollars; now, do you know as a matter of fact whether or not the 6000 of preferred stock in the Canton-Akron Railway Company were given in payment by the Canton-Akron Railway Company on the purchase price of the Canton-Massillon Railway Company?

A. According to the records here—here is an entry on the other side showing "Investment, Canton-Massillon Electric Railway Company for 6000 shares of C.-M. stock, one million dollars."

Q. So that as a bookkeeper and an accountant you would draw the conclusion, would you not, that the Canton-Akron Railway Company bought the Canton-Massillon Electric Railway Company by paying the Canton-Massillon Electric Railway Company 6000 shares of preferred stock of the Canton-Akron Railroad Com-
241 pany at par value of $100 each?

A. Yes, the preferred stock.

Counsel for Defendant: How about the common; doesn't it say a million there?

A. It says a million, they extend it one million.

Q. Then on the same date, June 17, 1902, there was issued by the Canton-Akron Railway Company, 4000 shares of its common stock?

A. According to the record, yes.

Q. And your records do not show that the Canton-Akron Railway Company received any cash for the 4000 shares of common stock issued by that company?

A. Not from this record.

Q. Is there any other record? That is the cash record of the company, is it not?

A. It is the cash record.

Q. Now, there were issued certain bonds by the Canton-Akron Railway Company under date of March 1, 1902, of which bonds

the Knickerbocker Trust Company of New York City was named trustee, in the sum of $1,150,000, is that not right?

A. That is right.

Q. Have you anything to show the amount of money received by the Canton-Akron Railway Company for the sale of those bonds?

A. I could show you how they disposed of it here from time to time; start out with the first item on June 30, 1902?

Q. Just show us how they were disposed of and the dates.

A. This is the way the entry reads on the ledger: June 30,
242 1902, to National Railway Construction Company, $600,000, construction, $150,000; bonds of company, $88,800, 7½% discount on $96,000, $7200; June, 1903, to National Railway Construction Company, $100,000; August, 1903, to National Railway Construction Company, $50,000; November, 1903, to National Railway Construction Company, $50,000; March 31, 1904, construction, $26,000; October 31, 1904, by journal, $37,000; August 31, by journal, $41,000;" that makes the entire issue.

Q. What does that mean "by journal," I would like to have those items $37,000 and $41,000 explained.

A. Treasury bonds; it says issued 37 treasury bonds.

Counsel for Defendant: $37,000?

A. Yes.

Counsel for Defendant: What date?

A. October 31.

Q. The company received, according to this ledger, $43,475 cash?

A. I don't believe they had a journal at the time; I believe they must have taken it through voucher list.

Q. You cannot tell what the company received from the sale of the $47,000 of bonds?

A. Not from this entry.

Q. Now, the sale of that other amount, $31,000?

A. That would make $43,475; and the $31,000, I think would make the entire issue, that makes $1,150,000.

Q. But you cannot tell what the company received for $31,000 or for the $47,000 worth of those bonds?

A. I cannot, from these records.

243 Q. Of those $1,150,000 worth of bonds, $826,000 worth, par value of those bonds were transferred to the National Railway Construction Company, and $150,000, the books show, were just charged to "construction."

A. Yes, sir.

Q. Were you with the Canton-Akron Railway Company?

A. No, sir.

Q. You don't know whether or not the National Construction Company constructed any lines for the Canton-Akron Company, do you?

A. I do not.

Q. Now, have you the books, or have you made an examination of the books of the Canton-Akron Consolidated Railway Company?

A. Yes, sir.

Q. Do the books of that company show what they paid to the

Canton-Akron Railway Company for the purchase of the properties of the Canton-Akron Company?

A. Yes, sir.

Q. What was the outstanding capital stock of the Canton-Akron Company on or about October 16, 1905, the time that the Canton-Akron Consolidated Railway Company took over the Canton-Akron Railway Company as shown by the books?

A. They had $725,700 worth of preferred stock.

Q. How much common?

A. It doesn't show any common of the Canton-Akron Consolidated at all.

Q. You misunderstood my question. Do the records of the Canton-Akron Railway Company, not the Canton-Akron Consolidated Railway Company, show the amount of capital stock outstanding of that company at the time it was turned over by the Can-
244 ton-Akron Consolidated Railway Co.?

A. I don't find any on their books at all of the Canton-Akron.

Q. Wouldn't their stock books show the amount of stock they had outstanding at that time, the Canton-Akron Railway Company, at the time they were absorbed by the Canton-Akron Consolidated Railway Company?

A. There are no Canton-Akron Consolidated Railway Company books; they went right on to the N. O. T. & L. books.

Q. According to our stipulation in this case the properties of the Canton-Akron Railway Company were assigned and transferred to the Canton-Akron Consolidated Railway Company, on or about October 10, 1906; now, do the records held by the defendant company in this case show what was paid by the Canton-Akron Consolidated Railway Company to the Canton-Akron Railway Company for properties of the Canton-Akron Railway Company?

A. Yes.

Q. What did they pay?

A. That will take up the issue of the bonds of the Canton-Akron Consolidated; you started on that; Canton-Akron Consolidated Railway Company bonds, October 31, 1906, to preferred stockholders of the Canton-Akron Railread Company, $708,700 bonds; to preferred stockholders of the Canton-New Philadelphia Railway Company $275,000 of bonds; same date, commission to Tucker-Anthony & Company, $25,000 bonds; October 31, in escrow to retire the Tuscarawas Railroad Company first mortgage bonds, $100,000; October 31, to preferred stockholders, C. & A. Railway Com-
245 pany, $17,000 bonds; February 28, 1910, cash for part of one bond, $300; February 28, sold one bond at $840, for par value of $1000; October 31, 1913, sold 25 bonds at $830 each, amounting to $20,750, for the par value of $25,000 in bonds; in treasury not certified $290,000 bonds; deposited with treasury certified, $58,000; deposited as collateral of serial bonds, $1,000,000; whole issue of $2,500,000.

Q. That is hardly an answer to the question as to what the records show the Canton-Akron Consolidated Railway Company paid the

Canton-Akron Railway Company for its properties; you have read what the books show as to the issue of bonds by the Canton-Akron Consolidated Railway Company at the time it purchased the properties of the Canton-Akron Company got the assets of the old Canton-Massillon Electric Railway Company, being the lines at Canton and Massillon city lines and the interurban lines between Canton and Massillon and the line running from Canton to Akron?

A. Yes, sir.

Q. Were there any other properties included in the purchase by the Canton-Akron Consolidated Company?

A. Yes, sir.

Q. What were they?

A. Canton-New Philadelphia Railway and the Tuscarawas Traction.

Q. The Canton-New Philadelphia Railway properties were run from Massillon southward?

A. From Navarre.

Q. From Navarre southward to Dennison?

A. Navarre to New Philadelphia.

246 Q. But all of these properties did not come from the Canton-Akron Railway Company?

A. No, sir.

Q. The Canton-Akron Railway Company only owned the Canton, Massillon and Akron city lines and the Canton-Massillon line so far as Navarre?

A. Yes.

Q. Each was bought over by the Canton-Akron Consolidated Railway Company at the time this same company bought the Canton-New Philadelphia line and the Tuscarawas Traction?

A. Yes.

Q. Now, do the records show the amount of the capital stock of the Canton-Akron Railway Company at the time it sold out to the Canton-Akron Consolidated Company?

A. The Canton-Akron Railroad Company stock was $1,038,900.

Q. That includes the $600,000 that was issued at the time it took over the Canton-Massillon and the $400,000 issued on June 17, 1902?

A. According to the records, yes.

Q. And according to the records the $28,900 of the stock making a total of $1,038,900 was issued in June, 1913, to the National Railway Construction Company, was it not?

A. Yes, sir.

Q. And the Canton-Akron Consolidated Company gave to the stockholders in the Canton-Akron Railway Company for the assets of that company the amount of bonds that you have read into this record?

A. They gave to the preferred stockholders $725,700.

Q. So that the Canton-Akron Consolidated Railway Company gave to the holders of the preferred stock in the Canton-

247 Akron Railway Company bonds of the par value of $725,-700, the exact amount face value of the preferred stock issued by the Canton-Akron Railway Company?

A. Yes, sir.

Q. And that retired that preferred stock?

A. Of the Canton-Akron Railway Company.

Q. Do your books show the amount of capital stock that was issued and outstanding by the Canton-Akron Consolidated Railway Company at the time it transferred its assets to the Northern Ohio Traction & Light Company?

And the hour of adjournment having arrived the further hearing of this cause is adjourned to one o'clock p. m. of the same day and date.

A. What books do you mean?

Q. The stock books or account books?

A. I don't know anything about the stock books; the N. O. T. books show what they did.

Q. What do the N. O. T. books show?

A. They took up the stock of the other companies by giving bonds and stocks.

Q. What amount of common stock of the N. O. T. was given to stockholders of the Canton-Akron Consolidated Railway Company?

A. $1,038,900; that would be 10,389 shares.

Q. When was that given?

A. On October 31, 1906, 10,364 shares were delivered and on January 31, 1907, 25 shares.

Q. In order to make this clear to the court, do the account books of the company show that the Canton-Massillon line, the
248 line in question in this case, belonged to the Massillon Electric Railway Company and was transferred by the sale from the Canton-Massillon Electric Railway Company to the Canton-Akron Railway Company; and then from the Canton-Akron Railway to the Canton-Akron Consolidated Railway Company, and from the Canton-Akron Consolidated Railway Company to the defendant company, the Northern Ohio Traction & Light Company?

A. Yes, sir.

Q. You have given us the amount of bonds of the Canton-Akron Consolidated Company, namely, $725,700 bonds, that were given to the holders of preferred stock of the Canton-Akron Railway Company, that is a part of the outstanding issue of $1,052,000?

A. It is.

Q. And another $100,000 worth of those bonds, par value, were given to the Tuscarawas Railway Company?

A. No, only in escrow; they lay there to take the place of those bonds when they fall due to take them up.

Q. As the Tuscarawas Railroad bonds were assumed by The Northern Ohio Traction & Light Company, these bonds lay to take them up?

A. Yes, in escrow in Canton-Akron Consolidated.

Q. That makes $825,000, now where are the balance of the $1,052,000 of issued bonds?

A. 275 bonds——

Q. Of the par value of $1,000 each?

A. Yes, given to the preferred stockholders of the Canton-
249 New Philadelphia Railway; $25,000 was given as commission on this entire transaction——

Q. To Tucker-Anthony Company?

A. Yes; and the balance of $26,300 were sold for cash.

Q. You know whether the Consolidated Railway Company received par value for the sale of those bonds?

A. They did not.

Q. What did it receive for the sale of those bonds in cash?

A. One of them was sold at $840, and 25 at $830.

Counsel for Defendant: Were the balance sold at par?

A. Well, they were turned in to the other railroad companies at par.

Q. At the time the Canton-Akron Railway Company sold out to the Canton-Akron Consolidated Railway Company—in order to get the matter clear—what do the books show was the amount of capital stock of the Canton-Akron Railway Company was outstanding, first going to the common stock?

A. $1,038,900.

Q. And how much preferred stock?

A. $725,700.

Q. And this preferred stock was taken up by the bonds of the Canton-Akron Consolidated Railway Company?

A. Yes, sir.

Q. For the exact amount?

A. The exact amount.

Q. How was the common stock taken up by the Canton-Akron Consolidated Railway Company?

A. By giving N. O. T. & L. common stock at the same time.

250 Q. That is, when the properties were transferred to the N. O. T. & L. Company, the N. O. T. & L. Company gave an equal amount of common stock, namely, $1,038,900 of its common stock for the common stock of the Canton-Akron Railway Company?

A. Yes, sir.

Q. Have you any books in your possession that will show what the Canton-Akron Railway Company received in cash for the amount of its outstanding common stock at the time its properties were transferred to the Canton-Akron Consolidated Railway Company?

A. No, sir.

Redirect examination.

By Mr. Welty:

Q. Mr. Lahr, you were not in any way connected with the Canton-Massillon Electric Railway Company?

A. No, sir.

Q. Nor the Canton-New Philadelphia Railway Company?

A. No, sir.

Q. Nor the Tuscarawas Traction Company?

A. No, sir.

Q. Nor the Canton-Akron Railroad Company?
A. No, sir.
Q. Now, the Canton-Akron Consolidated Railway Company?
A. No, sir.
Q. And what you have testified heretofore concerning these different companies is simply from the books of the different companies that are now in the possession of the defendant?
A. Yes, sir.
251 Q. The records showing that the Canton-Akron Railway Company paid for the Canton-Massillon Electric Railway Company one million dollars and assumed all bonded indebtedness?
A. Yes, sir.
Q. And you have no books showing the amounts of monies paid to the different construction companies for the construction of the road?
A. No, sir.

That is all.

It is stipulated and agreed between counsel for all parties that from that date of the granting of the franchise and the passage of the Lynch resolution, February 22, 1892, up to the present time, no resolutions have been adopted by the board of commissioners of Stark county, Ohio, and no action taken by them except as appears from the evidence already introduced in this case in reference to said grant under the resolution of February 22, 1892, or in reference to the right of this defendant or its predecessors in title to occupy the highway between the city limits of Canton and Massillon under said grant.

Thereupon the defendant rests its case in chief.

And the foregoing is all of the evidence offered on behalf of the relator and all of the evidence offered on behalf of the defendant in the trial of this cause.

The above and foregoing is a transcript of all of the evidence offered on behalf of the relator, and all of the evidence offered on behalf of the defendant, in the trial of this cause, given in the order and at the times herein stated, as shown by the stenographic
252 notes taken at the time said evidence was being introduced.

FRED MARPE.

Certificate of A. M. McCarty, Special Master Commissioner.

I, A. M. McCarty, special master commissioner appointed to take such testimony and proofs as may be offered by either the relator or the defendant pertinent to the points at issue in this proceeding and raised by the pleadings filed herein, and to issue all necessary processes and subpœnas duces tecum for the attendance of witnesses and the production of such books and other written evidence as may be competent, and to administer all necessary oaths, and to report in writing all such examinations and testimony to the court, without unnecessary delay, hereby certify the foregoing to be a true

and correct transcript of all of the testimony and proofs submitted to me, including the original documents and evidence offered and admitted, which are returned herewith.

A. M. McCARTY,
Special Master Commissioner.

Dated, Canton, O. Dec. 17, 1914.

253 *Certificate of Lodgment.*

THE STATE OF OHIO,
City of Columbus, ss:

In the Supreme Court of the State of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
v.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that there were lodged with me as said Clerk on the 9th day of November, 1915, in the above cause, the following papers:

(1) Two copies of the Writ of Error, as herein set forth; one for Plaintiff and one for my office;

(2) The Original Bond, with Affidavits as to Sureties, of which a true copy is herein set forth.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of the State of Ohio, this 6th day of December, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio.

254 *Authentication of Record.*

THE STATE OF OHIO,
City of Columbus, ss:

In the Supreme Court of State of Ohio.

No. 14114.

THE STATE OF OHIO on the Relation of HUBERT C. PONTIUS, the Prosecuting Attorney of Stark County, Ohio, Plaintiff,
v.
THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE CLEVELAND TRUST COMPANY, Defendants.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order of allowance of writ of error, writ of error, citation and acknowledgment of service thereon and precipe are the original papers filed in this court in the above entitled cause; that the foregoing copy of bond is a true and correct copy of the original bond, including affidavits as to sureties, filed in said cause and now lodged in my office; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court; that a copy of the opinion in said cause duly authenticated by the Supreme Court Reporter is hereto attached.

I further certify that the foregoing copy of the printed record is a true and correct copy of the printed record filed in said cause and that the typewritten copies of process, return of process, and of exhibits and portions of the record not printed are true copies of said exhibits and said portions of the record, and that said printed and typewritten copies together constitute a true, full, correct and complete transcript of the record and all proceedings had in
255-499 Case No. 14114, in the Supreme Court of the State of Ohio, wherein The State of Ohio, on the relation of Hubert C. Pontius, Prosecuting Attorney, Stark County, Ohio, is plaintiff, and The Northern Ohio Traction & Light Company and The Cleveland Trust Company, are defendants, as fully as the same were filed and are of record in my office at Columbus, Ohio, and constitute the complete record used in the consideration of said cause by the Supreme Court of Ohio.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of Ohio, this 6th day of December, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clern Supreme Court of Ohio.

* * * * * * *

500 *Statement of Errors on which Plaintiffs in Error Intend to Rely and of the Parts of the Record Which They Deem Necessary for the Consideration Thereof.*

In the Supreme Court of the United States, October Term, 1915.

No. 750.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY, THE CLEVELAND TRUST COMPANY, Plaintiffs in Error,

vs.

STATE OF OHIO ex Rel. HUBERT C. PONTIUS, Defendant in Error.

Now come the Plaintiffs in Error, The Northern Ohio Traction & Light Company and The Cleveland Trust Company, and respectfully represent that the following are the grounds of Error on which they intend to rely in this cause, to-wit:

1. The Supreme Court of Ohio erred in holding that the exercise of authority under the State of Ohio by the Board of County Commissioners of Stark County, Ohio, in adopting its Resolution on February 19th, 1913, declaring terminated the grant, franchise and conveyance under and by virtue of the Resolution of said County Commissioners of February 22nd, 1892, under and by virtue of which said The Northern Ohio Traction & Light Company was maintaining and operating its interurban electric railroad upon the public highway between the Cities of Canton and Massillon, Ohio, and directing said The Northern Ohio Traction & Light Company to remove its interurban electric railroad from said highway, was not repugnant to the Constitution of the United States, and was not an impairment of the obligation of contract as between said Board of County Commissioners of Stark County, Ohio, and the Plaintiff in Error, and not a taking without due process of law of the property of the Petitioners in Error herein, and that the same was not a denial to the Petitioners in Error of the equal protection of the law.

501 2. Said Supreme Court of Ohio erred in holding in this cause that the grant, franchise and conveyance by Resolution of February 22nd, 1892, granting unto William A. Lynch, and such railroad company as he may cause to be incorporated, the right to locate, construct, maintain and operate an electric railroad along either side of the public highway running between Canton and Massillon, Ohio; and the amendment of said resolution of said Board of County Commissioners of Stark County, Ohio, by resolution adopted May 3rd, 1909, conferring upon said The Northern Ohio Traction & Light Company the right to lay a double track upon a small portion of said highway conferred only a license terminable at the will of either party.

3. Said Supreme Court of Ohio erred in holding that said grant by virtue of said resolutions of said Board of County Commissioners of Stark County, Ohio, adopted on February 22nd, 1892, and May 3rd, 1909, did not constitute a perpetual grant and franchise.

4. The judgment of the Supreme Court of Ohio in this cause was repugnant to the Constitution of the United States in that the same was an impairment of the obligation of contract as between the Board of County Commissioners of Stark County, Ohio, and the State of Ohio, and the Petitioners in Error herein, was a taking without due process of law of the property of the Plaintiffs in Error herein, and was a denial to the Plaintiffs in Error herein of the equal protection of the law, in contravention of the guaranties of the Constitution of the United States.

Plaintiffs in Error respectfully represent that for the consideration of the above claims of Error they deem the following parts of the record necessary, to-wit:

Pleadings;
Process;
Return of Process;
Report of A. M. McCarty, Special Master Commissioner appointed by the Supreme Court of Ohio;
Docket and Journal Entries of the Supreme Court of Ohio;
Opinion of the Minority of the Supreme Court of Ohio;
Petition for Writ of Error;
Assignment of Errors;
Order allowing Writ of Error;
Writ of Error;
Citation and Acknowledgment of Service thereof;
Copy of Bond, and Affidavits of Sureties attached thereto;
Præcipe and Acknowledgment of Service thereof;
Certificates of the Clerk of the Supreme Court of Ohio.

502 Plaintiffs in Error state that, in their judgment, therefore, the following papers contained in the transcript of this case transmitted by the Clerk of the Supreme Court of Ohio need not be printed, and request that the following papers be omitted from the Printed Record prepared by the Clerk of the Supreme Court of the United States, to-wit:

Map and Resolutions, being Defendant's Exhibit No. 1;
Three Mortgage Deeds of Trust, being Defendant's Exhibits Nos. 2, 3 and 4;
Record Book of The Canton-Massillon Electric Railway Company, being Defendant's Exhibit No. 5;
Annual Statement of The Northern Ohio Traction & Light Company for the year 1913, being Relator's Exhibit "A."

THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
By VIRGIL P. KLINE, *Counsel.*
THE CLEVELAND TRUST COMPANY,
By VIRGIL P. KLINE, *Counsel.*

STATE OF OHIO,
County of Stark, ss:

Russell J. Burt, being first duly sworn, on his oath says that he is a practicing attorney in the City of Canton, Ohio, and a member of the firm of Welty & Burt, attorneys for The Northern Ohio Trac-

tion & Light Company, Petitioner in Error above-named; that on the 27th day of January, 1916, he did serve notice upon the Defendant in Error herein of the foregoing Statement of Errors, by delivering copy of the same to A. T. Snyder, of counsel for Defendant in Error, personally. Further affiant saith not.

RUSSELL J. BURT.

Sworn to and subscribed in my presence this 27th day of January, 1916.

[Notarial Seal, Stark County, Ohio.]

J. J. McCALL,
Notary Public in and for Stark County, Ohio.

503 [Endorsed:] In the Supreme Court of the United States, October Term, 1915. No. 750. The Northern Ohio Traction & Light Company, The Cleveland Trust Company, Plaintiffs in Error, vs. State of Ohio, ex rel. Hubert C. Pontius, Defendant in Error. Statement of Errors on which Plaintiffs in Error intend to rely and of the Parts of the Record which they deem Necessary for the consideration thereof. 750/25033.

504 [Endorsed:] File No. 25033. Supreme Court U. S., October term, 1915. Term No. 750. The Northern Ohio Traction & Light Co. et al., Pl'ffs in Error, vs. The State of Ohio ex rel. Herbert C. Pontius, etc., Statement of errors relied upon and designation by the plaintiff in error of parts of record to be printed, and proof of service of same. Filed January 31, 1916.

Endorsed on cover: File No. 25,033. Ohio Supreme Court. Term No. 313. The Northern Ohio Traction & Light Company and The Cleveland Trust Company, plaintiffs in error, vs. The State of Ohio on the relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio. Filed December 10th, 1915. File No. 25,033.

Office Supreme Court, U. S.
FILED
MAR 10 1917
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

October Term, 1916.

No. 312. 60

THE NORTHERN OHIO TRACTION & LIGHT COMPANY

and

THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

THE STATE OF OHIO on the Relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR, THE CLEVELAND TRUST COMPANY.

W. T. HOLLIDAY,
Solicitor for Plaintiff in Error,
The Cleveland Trust Company.

In the Supreme Court of the United States

October Term, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY

and

THE CLEVELAND TRUST COMPANY,

Plaintiffs in Error,

vs.

THE STATE OF OHIO on the Relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR, THE CLEVELAND TRUST COMPANY.

W. T. HOLLIDAY,

Solicitor for Plaintiff in Error,

The Cleveland Trust Company.

CASES CITED.

Boise Artesian Hot and Cold Water Company, Ltd., vs. Boise City, 230 U. S., 84 15

City of Louisville, Ky., vs. Cumberland Telephone & Telegraph Co., 224 U. S., 649 9

City of Seattle vs. The Columbia & Puget Sound R. R. Co. et al., 6 Wash., 379 13

Des Moines City Ry. Co. vs. City of Des Moines, 151 Fed., 854 14

Old Colony Trust Company vs. City of Omaha, 230 U. S., 100 12

Omaha vs. Council Bluffs Street Ry. Co., 90 Neb. 6.. 15

Owensboro vs. Cumberland Telephone & Telegraph Co., 230 U. S., page 58 15

Port of Mobile vs. L. & N. Ry. Co., 84 Ala., 115 15

State ex rel. Hudson Telephone Company, Prosecutor, vs. Mayor and Aldermen of Jersey City, 49 N. J. Law, 303 12

State vs. Citizens Street Ry. Co., 80 Neb., 357 at 343. 15

State vs. Citizens Street Ry. Co., 80 Neb., 357 at 360. 15

In the Supreme Court of the United States

October Term, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY

and

THE CLEVELAND TRUST COMPANY,

Plaintiffs in Error,

vs.

THE STATE OF OHIO on the Relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR, THE CLEVELAND TRUST COMPANY.

For a statement of the issues and facts of this case, this plaintiff in error refers to the brief filed herein by The Northern Ohio Traction & Light Company, plaintiff in error, and also refers to that brief for a consideration of the law governing this case as to *res judicata* and the perpetuity of the grant in question. There is one special feature in this case, however, which especially affects this plaintiff in error and those whom it represents, to which it desires to especially call the Court's attention, to-wit: the rights of bondholders and the general investing public.

This plaintiff in error is the trustee under a mortgage deed of trust from The Canton-Massillon Electric Railway Company, dated May 1, 1900, securing an issue of $850,000.00 par value of said company's 5% gold bonds, all of which are issued and still outstanding. All

of these bonds mature in 1920, and the principal asset which this plaintiff in error holds as trustee, under said deed of trust, securing the payment of said bonds, is the interurban railroad and franchise involved in this case. The granting of the prayer of the petition, to-wit, the ousting of the plaintiff in error from its use of the highway for interurban railroad purposes between the cities of Canton and Massillon, would mean the destruction of the principal asset of security, to-wit, the franchise, and the scrapping of the electric railroad in question, so that the bondholders represented by this plaintiff in error would secure practically nothing from the security of said deed of trust.

It is a fact of the utmost importance, that this case involves not merely a question of right between the commissioners and The Northern Ohio Traction & Light Company as a corporate entity, but it vitally involves the interests of the innocent public. Since the interests of the latter as so closely identified with the interests of the particular bondholders whom this plaintiff in error represents, this plaintiff in error desires to particularly call to the Court's attention the facts relating thereto and the established law recognizing the interests of such outside parties in the decision of such a case as the one at bar.

The county commissioners of Stark County have sat by in silence for more than twenty-one years and witnessed the expenditure of vast sums of money in the construction and improvement of the railroad in question, which money was obtained from the innocent investing public by the sale of stocks and bonds of the various companies owning the franchise and railroad in question. For over twenty-one years they have witnessed in silence the successive transfers of the railroad and franchise to the various companies as set forth in the statement of facts in The Northern Ohio Traction &

Light Company's brief. Furthermore, as set forth in that statement of facts, the assignment from the Canton-Massillon Electric Railway Company to The Canton-Akron Railway Company was endorsed on the margin of the commissioners' journal at the bottom of the record of the resolution of February 22nd, 1892, conferring the franchise; and in the Reedurban franchise to The Northern Ohio Traction & Light Company the commissioners expressly recited that the franchise of 1892 was assignable, and that The Northern Ohio Traction & Light Company was the owner thereof. In silence the commissioners have witnessed the execution of three mortgage deeds of trust upon the railroad and franchise in question and the issue and sale of bonds secured thereby to the general investing public (Record, page 73ff). These commissioners have witnessed in silence the building up by The Northern Ohio Traction & Light Company and its predecessors in title, of a large and elaborate system of interurban electric railway lines extending, with several branches, from the city of Cleveland in Cuyahoga County, through the cities of Akron, Canton, Massillon and New Philadelphia to Uhrichsville, Tuscarawas County, Ohio, and the extension and improvement of the street railway systems of Canton and Massillon. The railroad in question is an integral part of this entire system of electric lines from Cleveland to Uhrichsville without which, continuity of that system would be broken and The Northern Ohio Traction & Light Company rendered incapable of performing its functions as a common carrier between those cities. Also the railroad in question is so essential a part of the street railway systems of Canton and Massillon that it now practically makes them one system, and in the matter of social and business intercourse makes these two cities practically one municipality.

In addition to the three bond issues, secured by mortgages upon the railroad in question, numerous other bond issues are secured by mortgages upon the other parts of The Northern Ohio Traction & Light Company system. The granting of the prayer of the petition would, therefore, also greatly impair the value of these other bonds.

Moreover, as set forth in the statement of facts in The Northern Ohio Traction & Light Company's brief, large sums of money have been invested by the public in improvements upon the real estate abutting upon the railroad in question, and in addition to this undoubtedly incalculable numbers of adjustments of personal and business life have been made by the public in reliance upon the permanency of the railroad and franchise in question, and upon the assumption that the railroad in question would continue to render The Northern Ohio Traction & Light Company's railroad a continuous system. When it is also borne in mind how the interurban electric railroads have spread like a net work throughout northern Ohio, and that The Northern Ohio Traction & Light Company connects directly or indirectly with almost all these other interurban railroads, it is not to be wondered at that owners of property abutting upon the railroad in question, who testified in this case, stated that no railroad company other than The Northern Ohio Traction & Light Company could render the railroad service between Canton and Massillon that is now rendered by the railroad in question under its present ownership. (Record, pages 115, 116, 117, 122.)

All the various assignments of the franchise and railroad in question, all of the purchases of stocks and bonds secured by said railroad and franchise, all of the improvements upon the railroad, made from the proceeds of such purchases, and all the incalculable num-

bers of improvements of adjoining property, and adjustments of business and personal life, have been made by the general public in reliance upon the assignability and permanency of the franchise in question. All these acts of the various successive railroad companies and the general public, and the acquiescent attitude of the commissioners in regard thereto, surely indicate a greater permanency of the franchise in question than a mere tenancy at will. The very nature of the grantees' obligations as common carriers, and the permanency of the construction and improvements required for such a railroad, indicated at the time of the granting of the franchise in 1892, that a permanent and not a transitory right was being conferred by the county commissioners. Upon such facts the courts have uniformly held that the public authority granting a franchise, by reason of the very nature of the privilege conferred, and by its acquiescent conduct, has estopped itself from denying the permanency of the grant, and further, that such construction of permanency of the grant by all parties in interest will bind the courts in their interpretation thereof. We respectfully call the Court's attention to a few of the leading authorities to this effect:

City of Louisville, Ky., vs. Cumberland Telephone & Telegraph Co., 224 U. S., 649.

Syllabus 4. "While franchises to be are not transferable without express authority, franchises to have and to hold and to use are contractual and proprietary and can be transferred; and, held in this case, that the franchise granted to a telephone company was property, taxable and alienable under the conditions on which it was granted, and, under the contract clause of the Constitution, could not be abrogated as against a transferee whose rights had been recognized by the municipality."

Syllabus 5. "Permitting the transferee of a franchise to act thereunder and expend large sums

of money and exacting from it a bond to comply with the conditions of the franchise will operate to estop a municipality from denying that the franchise was transferable and the transferee had succeeded to all the rights of the transferring corporation."

In this case the city council of Louisville in 1886, passed an ordinance granting to the Ohio Valley Telephone Company the right to maintain a telephone system upon the streets of the city, no time being mentioned for the duration of the grant. Later, the Ohio Valley Telephone Company consolidated with the Cumberland Telephone & Telegraph Company, a new corporation being created under that name, which by virtue of the Kentucky statute, "was thereafter vested with all the property of the constituent companies without deed or transfer." Thereafter the city council passed an ordinance repealing said franchise. Thereupon the last mentioned company brought this suit in the federal court to enjoin the city from interfering with the plaintiff's business or property. The trial court granted a permanent injunction which was affirmed upon appeal by the Circuit Court of Appeals, which judgment was again affirmed by the Supreme Court of the United States upon the ground that the telephone Company had a perpetual and assignable grant. On page 660, the Supreme Court say:

"While franchises *to be* are not transferable without express authority, there are other franchises to have, to hold and to use, which are contractual and proprietary in their nature and which confer rights and privileges, which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone

business. Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right-of-way—but howsoever designated, it is property. *Detroit vs. Detroit Street Ry.*, 184 U. S., 368, 394; *Louisville City Ry. vs. Louisville,* 71 Kentucky (8 Bush.), 534; *West River Bridge vs. Dix,* 6 How., 507, 534; *Board of Morristown vs. East Tenn. Tel. Co.,* 115 Fed. Rep., 304, 307. Being property, it was taxable, alienable and transferable, and, as property, passed to the Cumberland Telephone & Telegraph Company under the express provisions of the Kentucky statute, which, as of force of 1900, declared that the consolidated company should be 'vested with all the property, business, assets and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities.' " * * *

"*The city itself so construed the general law,* and thereupon demanded from the Cumberland Company, as successor of the Ohio Valley Company, the bond for $50,000 called for in the ordinance of August 17, 1886. The company, in pursuance of the collateral contract contained in the ordinance, and of the requirements of the consolidation statute, carried the police and fire wires of the city free of charge. With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits, and strung miles of wire in extending and improving the telephone system. *This action of the council could not enlarge the charter grant, but did operate to estop the city (Boone County vs. Burlington & M. R. R.,* 139 U. S., 684, 693) *from claiming that the ordinance was inoperative and it also prevented the Council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company.*"

Old Colony Trust Company vs. City of Omaha, 230 U. S., 100.

Syllabus 8. "The practical interpretation of a contract by the parties thereto for a considerable period before a controversy arises is of great, if not controlling, influence; and this rule is applicable in Nebraska as in the nature of estoppel.

Syllabus 9. Acquiescence by the municipality in the extension of a franchise for electric light to distribution of electricity for power and heat evidenced, as in this case, by collection of taxes imposed on receipts therefrom and the purchase by the city of current for power, *held,* to entitle those who had advanced money on the security of the franchise to insist upon the recognition and continuation of the right of the corporation to supply electricity for power and heat as well as light; and an ordinance requiring the corporation to discontinue such distribution of heat and power is void under the contract clause of the Constitution of the United States."

State ex rel. Hudson Telephone Company, Prosecutor, vs. Mayor and Aldermen of Jersey City, 49 N. J. Law, 303.

In this case the municipal authorities sought to annul a grant by the city, containing no provision as to the duration thereof. The court held the franchise to be perpetual. At page 304, the court say:

"I am of the opinion that as a general rule a designation of streets by a city, gives the company an irrevocable right to use the streets so designated, for the purposes indicated in the statute. Certainly after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right of which they cannot be stripped by a subsequent revocation of such designation.

The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stringing

wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a minute. The view that the rights of a corporation are of such an unsubstantial a character is opposed to all judicial sentiment, from the Dartmouth College case to the present time. *State, Britton, pros., vs. Blake,* 6 Vroom, 208, and cases cited on page 215.

The power to repeal, suspend or alter charters, contained in Section 6 of the Act concerning corporations (Rev., p. 178), does not reach the exercise of authority attempted by the common council. No provision is contained in the Act under which the prosecutors were incorporated, which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to the repeal or alteration by the Legislature, and when that corporation has acquired vested rights in the mode designated by their charter, it certainly was not in the power of the common council to strip them of any right so acquired."

City of Seattle vs. The Columbia & Puget Sound R. R. Co. et al., 6 Wash., 379.

In this case the facts were almost exactly the same as those in the present case, the franchise involved containing no provision as to duration. At page 392 the court say:

"Property rights acquired under and by virtue of franchises thus created, are perpetual, unless otherwise limited in the grant, and there was no limit in this instance, and such franchises are not void in consequence thereof.

There is no reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it *should be so bound to the end that property rights may be made stable and certain.*"

Des Moines City Ry Co. vs. City of Des Moines,
151 Fed., 854.

The issues in this case were practically identical with those in the case at bar. The franchise in question contained no provision as to duration and the Circuit Court, therefore, held it to be perpetual. This case was reversed by the Supreme Court in 214 U. S., page 175, simply upon the ground that no federal question was raised since the city had not actually terminated the grant but had simply threatened to do so. We call to the Court's attention the language of the Circuit Court on page 861:

> "For years the city of Des Moines, as well as the street car company has construed the Turner ordinance as one granting a perpetual franchise, unless forfeited for just cause. Resolution after resolution has been passed by the council, expressly or impliedly recognizing the Turner ordinance. The council has compelled the company to pave on account of tracks built since 1898, the date the city now says its franchise expired. It now says that the Turner ordinance expired by limitation in 1898, and that since that time the ordinance has been obsolete. And yet in 1900 in codifying the ordinances in force, and omitting obsolete ones, the Turner ordinance was placed in such Code as a live ordinance, and one of present binding force. The city council has directed new lines to be built since 1898, and since that date thirty miles have been built at great cost, and by so doing not only construed the ordinance as the company now contends, but the city ought to be and is estopped from denying the contract, tearing up the tracks, or declaring the company a trespasser."

In accord are:

Owensboro vs. Cumberland Telephone & Telegraph Co., 230 U. S., page 58.
Boise Artesian Hot and Cold Water Company, Ltd., vs. Boise City, 230 U. S., 84.
Port of Mobile vs. L. & N. Ry. Co., 84 Ala., 115.
State vs. Citizens Street Ry. Co., 80 Neb., 357 at 343.
State vs. Citizens Street Ry. Co., 80 Neb., 357 at 360.
Omaha vs. Council Bluffs Street Ry. Co., 90 Neb. 6.

In conclusion, therefore, this plaintiff in error submits that under the authorities the franchise in question is perpetual, that that construction of the grant is confirmed and made binding upon all parties by the surrounding circumstances and the construction of the permanency of the grant by the parties and the general public, and that to grant the prayer of the petition would be in violation of the constitutional protection of contractual and property rights.

Respectfully submitted,

W. T. Holliday,
Solicitor for Plaintiff in Error,
The Cleveland Trust Company.

FILED
MAR 10 1917
CLERK

In the Supreme Court of the United States

October Term, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY

and

THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

THE STATE OF OHIO on the Relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR, THE NORTHERN OHIO TRACTION & LIGHT CO.

JOHN C. WELTY,
JOHN C. WEADOCK,
JOSEPH S. CLARK,
Solicitors for Plaintiff in Error,
The Northern Ohio Traction & Light Company.

In the Supreme Court of the United States

October Term, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY

and

THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

THE STATE OF OHIO on the Relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR, THE NORTHERN OHIO TRACTION & LIGHT CO.

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The Northern Ohio Traction & Light Company.

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STATEMENT OF FACTS.

This case comes before this Court on a writ of error (record page 9) to the Supreme Court of Ohio, allowed by Hon. Hugh L. Nichols, Chief Justice of the Supreme Court of Ohio (record page 17).

The parties stand in this Court in the reverse relation to that in which they stood in the Supreme Court of Ohio, but for convenience, will be referred to in this brief as plaintiff or relator, and defendant respectively, as was their status in the Supreme Court of Ohio.

This is an action in quo warranto, begun in the Supreme Court of Ohio, to oust the defendant from its use of the public highway between the cities of Canton and Massillon, Ohio, and to have adjudged terminated the franchise under which the defendant, The Northern

Ohio Traction and Light Company, claims the right to occupy a portion of said highway with its interurban railway.

The Supreme Court of Ohio found in favor of the plaintiff, and ordered and adjudged that the defendant, The Northern Ohio Traction and Light Company, be ousted, and that it remove its tracks and switches from said highway within ninety (90) days. This decision was made by a divided Court, three of the seven Justices dissenting. The Court issued no opinion in support of the judgment, but a dissenting opinion in which the three dissenting Judges concurred, was issued and filed, and is set forth at page 18 of the record herein.

This defendant claims the right to occupy said highway by virtue of a resolution passed on February 22nd, 1892, by the County Commissioners of Stark County, Ohio, granting unto William A. Lynch and such railroad company as he may cause to be incorporated, the right to locate, construct, maintain and operate an electric railroad along either side of the State Road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon. (Record, page 64.) The Resolution specified no time for the duration of the franchise and the relator claims that it is, therefore, terminable at will.

After the passage of this resolution, which was accepted by said William A. Lynch, the latter caused to be incorporated The Canton-Massillon Electric Railway Company, an Ohio corporation, and transferred and assigned to it, its successors and assigns, all his right, title and interest in and to said franchise. (Stipulation, Record, page 72.)

The Canton-Massillon Electric Railway Company, under said franchise, constructed an interurban electric railroad along said highway between the cities of

Canton and Massillon, which railroad is now owned and operated by the defendant, The Northern Ohio Traction & Light Company, under and by virtue of the assignments and transfers hereinafter mentioned.

On June 17th, 1902, said The Canton-Massillon Electric Railway Company duly assigned and transferred to The Canton-Akron Railway Company, an Ohio corporation, its successors and assigns, all its right, title and interest in and to said electric railroad and said franchise. (Stipulation, Record, page 72.) This assignment was recognized and ratified by the Board of County Commissioners of Stark County, Ohio, by the following inscription, which appears upon the margin of page 18 of Volume 8 of the Commissioners' Journal, upon which also is recorded the said resolution of February 22nd, 1892, creating the franchise in controversy: "Transferred to Canton-Akron Railway Company, July 2nd, 1902, A. D. W. M. Reed, Auditor." (Record, page 65.)

Thereafter the railroad and said franchise were conveyed by said The Canton-Akron Railway Company to The Canton-Akron Consolidated Railway Company, an Ohio corporation, its successors and assigns, by deed dated October 10th, 1906. (Stipulation, Record, page 73.)

Thereafter said The Canton-Akron Consolidated Railway Company, by deed dated October 13th, 1906, conveyed said railroad and said franchise to this defendant, The Northern Ohio Traction & Light Co. (Stipulation, Record, Page 73.) All of these railway corporations have been in continuous existence from their organization down to the present time.

Since its construction by said The Canton-Massillon Electric Railway Company, in 1892, the said electric railroad extending between the cities of Canton and Massillon has been continuously operated up to the present

time by the above mentioned electric railway companies during their respective periods of ownership. During that period also several mortgages have been placed upon said electric railroad, securing bonds for large amounts of money, which have been purchased by the general investing public, and large sums of money realized from the sale of said bonds have been invested in the improvement and betterment of said electric railroad. These bond issues secured by mortgages upon said electric railroad may be briefly described as follows:

1. Deed of trust from The Canton-Massillon Electric Railway Company, to The Cleveland Trust Company, Trustee, dated May 1st, 1900, securing $850,000.00 par value of twenty-year, five per cent gold bonds issued and still outstanding. (Defendant's Exhibit No. 2, Record, pages 73, 74 and 79.)

2. Deed of trust from The Canton-Akron Railway Company to The Knickerbocker Trust Company of New York, dated March 1st, 1902, securing issue of five per cent twenty-year gold bonds:

Authorized issue.....$2,000,000.00
Issued and still outstanding bonds of par value of..... 1,150,000.00
(Defendant's Exhibit No. 3; Record, pages 74 and 79.)

3. Deed of trust from The Canton-Akron Consolidated Railway Company to The Citizens' Savings & Trust Company, of Cleveland, and S. Reed Anthony, Trustees, dated October 12th, 1906, securing an issue of Consolidated five per cent gold bonds; due in 1933.

Authorized issue		$2,500,000.00
Issued and outstanding par value of bonds	$1,052,000.00	
Issued and deposited as collateral, securing collatlateral trust notes of The Northern Ohio Traction & Light Company for $1,500,000.00 bonds of the par value of	1,000,000.00	
Bonds certified and authorized to be issued by the Public Utilities Commission of Ohio	58,000.00	
Bonds held in escrow to retire $100,000.00 par value of the bonds of The Tuscarawas Railroad Company	100,000.00	
Total bonds issued and outstanding		$2,210,000.00

(Defendant's Exhibit No. 4, Rec., pp. 75, 79, 80 and 81.)

All of the bonds mentioned above as issued and outstanding, are still unpaid, and are held by large numbers of the investing public scattered throughout the United States. (Record, page 81.)

At the time the County Commissioners of Stark County, Ohio, passed the resolution of February 22nd, 1892, conferring the franchise under which the defendant is operating said electric railroad, the statutes of Ohio conferred authority upon said County Commissioners to grant such a franchise, without any limitation as to the duration of the grant, and the County Commissioners had full power to grant a perpetual franchise, if they so desired. It was assumed by Mr. Lynch and the railway company which he organized, that the said resolution of February 22nd, 1892, did

confer upon them a perpetual franchise, and it is so stated in the minutes of that company, The Canton-Massillon Electric Railway Company, as shown by the record at pages 92 and 93. Likewise it has always been assumed by all parties concerned in the transfers of the franchise and the issuance of mortgages and bond issues upon said railroad and franchise as above outlined, that the grant was a perpetual one. Likewise, many of the inhabitants in the neighborhood of Canton and Massillon have acted in reliance upon the permanency of the location of said electric railroad and of said franchise, by erecting valuable improvements along said railroad, which would only be accessible by the continued maintenance and operation of that railroad. At Reedurban, allotments have been laid out, and many homes and valuable improvements made thereon, and a Catholic College, known as Mount Marie College, was built about six or seven years ago. This College is located about three and five-eighths miles from the Public Square in Canton and about a mile and a half from the city limits of Canton, and about four and three-eighths miles from the city of Massillon. (Record, pages 111, 114, 116.)

According to the testimony shown at the above pages of the Record, large numbers of students of this College are day students, depending upon the electric railroad in question for going to and from said College, and would have no practical means of attending the College but for the maintenance and operation of that electric railroad. According to the witness, Mr. Austin A. Lynch, the buildings of this College represent an investment of over one hundred and seventy-five thousand dollars ($175,000.00), and plans of the College contemplate considerable further construction of buildings, and the school has an attendance of about one hundred and twenty-five pupils. (Record, pages 89 and 90.)

Furthermore, the defendant, The Northern Ohio Traction & Light Company, is the owner and operator of a continuous line of electric railways between the cities of Cleveland, Akron, Canton, Massillon and Uhrichsville, and the eight miles of railroad involved in this suit, running between the cities of Canton and Massillon, are an integral part of this electric railway system, extending from Cleveland in Cuyahoga County to Uhrichsville in Tuscarawas County. (Record, pages 100 and 101.) Also the defendant is the owner and operator of the street railway systems in Canton and Massillon, and they are made practically one system by the connecting railway in question.

Ouster of this defendant from the road in question, therefore, would have not only the effect of destroying the security of the bondholders, impairing the value of adjoining property, and greatly inconveniencing the local public, but would break the chain of this defendant's continuous railway system, and would make impossible the performance of this defendant's duties as a common carrier between the cities of Cleveland, Canton, Massillon and Uhrichsville, thereby greatly inconveniencing the public at large throughout the northern part of Ohio.

The relator, in cross-examining the property owners who testified in this case as to the damage to their property and to the above mentioned College, which would follow from the abandonment of the railroad in question, brought forth the answer several times, that no operation of an electric railroad between Canton and Massillon by any other party than this defendant could replace the service rendered by this defendant, because of the fact that this defendant operated an entire system of railroad between Cleveland and Uhrichsville, thereby making the property along this line between Canton and

Massillon accessible to all points between Cleveland and Uhrichsville. (Record, pages 115 and 116.)

The first intimation that even the County Commissioners of Stark County doubted the perpetuity of the grant appeared in 1912, when a dispute had arisen between this defendant and the Commissioners as to the rate of fare to be charged for the transportation of passengers between Canton and Massillon. This dispute arose after the decision by the Supreme Court of Ohio of the case of The East Ohio Gas Company against the City of Akron, 81 O. S. page 33, which decision, the Prosecuting Attorney of Stark County advised the Commissioners (as we shall show, erroneously), made the grant to this defendant terminable at will. Thereupon, the County Commissioners instead of applying to the proper tribunal, to-wit: the Public Utilities Commission, for the regulation of such transportation rates, attempted to use this decision of the Supreme Court as a club to coerce this defendant into accepting the rates of fare prescribed by the Commissioners. (Record, page 69.)

On March 27th, 1912, the Commissioners passed a resolution concluding that unless The Northern Ohio Traction & Light Company complied with the Commissioners' demands as to the reduction of fare on or before April 27th, 1912, its franchise under said resolution of February 22nd, 1892,

> "is hereby declared terminated and the Prosecuting Attorney of this County is hereby instructed to take such legal proceedings as may be necessary to have such grant made null and void." (Record, pages 68, 69 and 70.)

This defendant declined to comply with the demands of that resolution, and, therefore, on April 26th, 1912, the County Commissioners passed another resolution, reciting that:

> "If The Northern Ohio Traction & Light Company fail to comply with the demands of the former

resolution, the Prosecuting Attorney is 'instructed to immediately take legal action against the said company, to compel it to remove its said electric railway from said public highway." (Record, pages 70 and 71.)

In obedience to these two resolutions, the Prosecuting Attorney of Stark County, on August 13th, 1912, commenced an action in quo warranto in the then Circuit Court of Stark County, Ohio, said action being entitled "State of Ohio, on the relation of Charles Krichbaum, Prosecuting Attorney of Stark County, against The Northern Ohio Traction & Light Company." The record of this entire case is shown at pages 49 to 63 inclusive of the record herein.

The petition in that action set forth in its entirety the resolution of February 22nd, 1892, granting the franchise in question, and also set forth in full the resolutions of the County Commissioners above referred to, passed on March 27th, 1912, and April 26th, 1912, and concluded with a prayer identical with that of the petition in the present case. This defendant filed a general and special demurrer to this petition, and the Circuit Court (by that time changed to the Court of Appeals) overruled the special demurrer which related to the Statute of Limitations, but sustained the first, second and fifth grounds of the general demurrer, which were:

1. That the petition did not state facts sufficient to constitute a cause of action against defendant.

2. That the petition did not state facts sufficient to entitle the plaintiff to the relief prayed for.

5. That the plaintiff had no legal capacity to try or bring this action. The third and fourth grounds of the general demurrer, to-wit: that the court had no jurisdiction; and that the action was barred by the Statute of Limitations, were overruled. From this decision of the Circuit Court the plaintiff has never appealed or

prosecuted error proceedings; the time for such proceedings has expired, and that judgment of the Circuit Court is a final decision of the issues involved in that case.

After the decision of that case as above outlined, the County Commissioners instead of prosecuting error or appealing the case, passed a new resolution, on February 19th, 1913, in no essential respect different from the resolution it had already passed on March 27th, 1912. This resolution is set forth in plaintiff's petition in the present suit at pages 26, 27, 28 and 29 of the Record herein. This resolution concluded as did the resolution of March 27th, 1912, that the said grant and conveyance is thereby terminated, and this defendant directed to remove its said railroad, and the Prosecuting Attorney is directed to institute this present suit. The only difference, therefore, between the suit now before this Honorable Court and the suit decided by the Circuit Court of Stark County, as above mentioned, is that since the decision of the latter case the County Commissioners have passed another resolution again declaring terminated the franchise of this defendant upon the highway in question. The petition in both these cases raised the claim that the franchise in question was not assignable. No claim has been made upon this matter by the relator in the briefs or argument, and the matter was not considered by the Ohio Supreme Court.

Upon this issue, however, we call the Court's attention to the fact that not only have the Commissioners sat by for over twenty-one years and permitted the above mentioned transfers and mortgages of said franchise to be made without objection, but the County Commissioners of Stark County have officially recognized the assignability of the grant by their resolution shown at page 65 of the Record herein, known as the Reedurban grant. This defendant sought a franchise from the

County Commissioners of Stark County to place a double track along the highway in question at Reedurban, and the resolution conferring this grant to this defendant recited that:

> "Whereas, on the 22nd day of February, 1892, the Board of Commissioners of Stark County, Ohio, did by resolution and proper proceedings then authorize and empower William Lynch, his heirs and assigns to lay, build, construct and operate an electric railroad upon the public highway between the cities of Canton and Massillon, on what is known as the Canton-Massillon Road; and
>
> Whereas, said electric street railway has been built and is being operated under said grant so made and all rights thereunder are now owned and controlled by The Northern Ohio Traction & Light Company, an incorporated company under the laws of Ohio." (Record, pages 65 and 66.)

Here we have an official recognition by the Commissioners not only of the assignability of the grant in question, but of the ownership thereof by this defendant.

The federal questions in this case were clearly raised in the Supreme Court of Ohio. It appears from the record herein that it was specifically pleaded by both defendants herein, and it was argued orally and in briefs by them that since said grant or franchise contained no provision as to the duration thereof, it was perpetual in duration, and that the action of the Board of County Commissioners of Stark County, Ohio, by said resolution adopted February 19th, 1913, was an exercise of authority under the State of Ohio, repugnant to the constitution of the United States in that it was an impairment of the obligation of contract as between the Board of County Commissioners of Stark County, Ohio, and the defendants herein, and a taking, without due process of law, of the property of the defendants, and a denial to the defendants of the equal protection of the law.

(Answers, Record, pages 37 and 46; Judgment, Record, page 17; Allowance of Writ, Record, page 18.)

The Supreme Court of Ohio, however, held that the grant in question was a mere license terminable at will by either party, and therefore, sustained as constitutional the action of the County Commissioners declaring the grant terminated.

SPECIFICATION OF ERRORS RELIED UPON.

This defendant contends that the Supreme Court of Ohio erred in the following respects:

1. The Supreme Court of Ohio erred in holding that the defendant's said grant and franchise was not perpetual in duration.

2. The Supreme Court of Ohio erred in holding that the defendant's said grant was a mere license, terminable at the will of either party.

3. The Supreme Court of Ohio erred in holding that the County Commissioners of Stark County, Ohio, had any authority reserved, delegated or otherwise, to forfeit said grant.

4. The Supreme Court of Ohio erred in holding that the exercise of authority under the State of Ohio by the Board of County Commissioners of Stark County, Ohio, in adopting its resolution on February 19th, 1913, declaring terminated the defendant's grant and franchise, was not repugnant to the constitution of the United States, was not an impairment of the obligation of contract as between said Board of County Commissioners of Stark County, Ohio, and the defendants, and not a taking, without due process of law, of the property of the defendants herein, and that the same was not a de-

nial to the defendants herein of the equal protection of the law.

5. The judgment of the Supreme Court of Ohio in this case was repugnant to the constitution of the United States in that the same was an impairment of the obligation of the defendants' contracts, and a taking, without due process of law, of their property, and a denial to the defendants of the equal protection of the law in contravention of the guaranties of the constitution of the United States.

OUTLINE.

In this brief we will consider the issues in the following order:

I. The decision of a state court is of no effect as to a question upon which the jurisdiction of the United States Supreme Court turns.

II. The granting and acceptance of the franchise in question created a contract within the protections and guaranties of the United States constitution.

III. The grant or contract in controversy has not expired, and the attempted forfeiture thereof by the County Commissioners of Stark County was, therefore, a violation of the United States constitution.

(a) At the time of the conferring of the franchise in question there was no limitation upon the duration of the grant which the Board of County Commissioners was authorized to confer.

(b) The County Commissioners had no authority, reserved, delegated, or otherwise, to forfeit the grant in question.

(c) The franchise in question is perpetual.

(d) Authorities holding such grant to be perpetual, and such attempted forfeiture thereof to be in violation of the United States constitution.

IV. The grant in question was assignable and this defendant is the owner thereof.

V. The County Commissioners are estopped to deny the perpetuity and assignability of the grant.

VI. The decision of the Circuit Court of Stark County constitutes *res judicata* and an estoppel upon the plaintiff to maintain this action.

ARGUMENT

I. THE DECISION OF A STATE COURT IS OF NO EFFECT AS TO A QUESTION UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT TURNS.

While this is an elemental principle of federal jurisdiction, lest the question should be raised by the relator, we call attention to the following decisions of the United States Supreme Court, which are only a few of its many decisions on this question. If this proposition were not true, the jurisdiction of the United States Supreme Court over cases involving impairment of contract rights would be practically a nullity.

Louisville Gas Company vs. Citizens Gas Company, 115 U. S., 683.

In this case, on a writ of error to the State Court of Kentucky, the question was raised as to whether a contract right under a legislative grant to a gas company

had been impaired by state legislation. At page 697 the United States Supreme Court says:

> "Whether an alleged contract arises from State legislation, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State Court, to decide whether there exists a contract within the protection of the Constitution of the United States. *Jefferson Branch Bank vs. Skelly,* 1 Black, 436; *Wright vs. Nagle,* 101 U. S. 791, 794; *Louisville & Nashville Railroad vs. Palmes,* 109 U. S., 254, 257. After carefully considering the grounds upon which the State Court rests its conclusion, we have felt constrained to reach a different result."

Stearns vs. Minnesota, 179 U. S. 223.

At page 232 the United States Supreme Court says:

> "The general rule of this court is to accept the construction of a state constitution placed by the State Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a State, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.
>
> In *Douglas vs. Kentucky,* 168 U. S. 488, this question was considered at length, and, by Mr. Justice Harland, after a review of some prior cases, the conclusion was thus stated (p. 502):
>
> 'The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether

its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co. vs. Debolt,* 16 How. 416, 452; *Wright vs. Nagle,* 101 U. S., 791, 794; *Louisville Gas Co. vs. Citizens' Gas Co.,* 115 U. S., 683, 697; *Vicksburg, Shreveport, etc., Railroad vs. Dennis,* 116 U. S., 665, 667; *N. O. Waterworks Co. vs. Louisiana Sugar Co.,* 125 U. S., 18, 36; *Bryan vs. Board of Education,* 151 U. S., 639, 650; *Mobile & Ohio Railroad vs. Tennessee,* 153 U. S., 486, 493; *Bacon vs. Texas,* 163 U. S. 207, 219.'

See also *McCullough vs. Virginia,* 172 U. S. 102, 109; *Walsh vs. Columbus, Hocking Valley & Athens Railroad Company,* 176 U. S. 469."

Atlantic Coast Line vs. Goldsboro, 232 U. S. 548. At page 556 the United States Supreme Court say:

"That a railroad charter may embody a contract, within the meaning of the Constitution, hardly needs to be stated. *Dartmouth College vs. Woodward,* 4 Wheat. 518. In the present case the Supreme Court of North Carolina held that by the constitution of the State, the charter was subject to alteration or repeal at the legislative will. If the right of repeal was indeed thus reserved, the result is obvious. *Greenwood vs. Freight Co.,* 105 U. S. 13, 21; *Knoxville Water Co. vs. Knoxville,* 189 U. S., 434, 437. But when this court has under review the judgment of a state court by virtue of par. 709, Rev. Stat., and the validity of a state law is challenged on the ground that it impairs the obligation of a contract, this court must determine for itself the existence or non-existence of the asserted contract, and whether its obligation has been impaired. *Douglas vs. Kentucky,* 168 U. S. 488, 502; *Stearns vs. Minnesota,* 179 U. S. 223, 233."

II. THE GRANTING AND ACCEPTANCE OF THE FRANCHISE IN QUESTION CREATED A CONTRACT WITHIN THE PROTECTIONS AND GUARANTIES OF THE UNITED STATES CONSTITUTION.

It is the almost universal rule and is also the established law in Ohio, that a resolution such as the one in question, upon being accepted by the railroad company, constitutes a contract between the railroad company and the public body conferring the franchise. From plaintiff's own brief filed in the State court, we quote the following authority: *State, ex rel., vs. The Cincinnati Gas-Light & Coke Company,* 18 O. S., 262, wherein at page 291, the franchise for the laying of gas pipes in said city streets was called by the court a contract.

In *Cleveland vs. The Cleveland City Railway Company,* 194 U. S., 517, at page 534, the court say:

> "That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Railway Co. vs. Village of Carthage,* 36 O. S., 631, 634; *City of Columbus vs. Street Railroad Co.,* 45 O. S., 98."

Since, therefore, the franchise in question constituted a contract, and, since, as the authorities hereinafter quoted establish, the term of such contract has not yet expired, to grant the prayer of the petition herein would be a violation of the constitutional protections of contracts.

III. THE GRANT OR CONTRACT IN CONTROVERSY HAS NOT EXPIRED, AND THE ATTEMPTED FORFEITURE THEREOF BY THE COUNTY COMMISSIONERS OF STARK COUNTY WAS, THEREFORE, A VIOLATION OF THE UNITED STATES CONSTITUTION.

The plaintiff contends that the defendant's grant has expired by reason of the fact that, as set forth in the statement of facts, *supra,* the County Commissioners of Stark County have passed two resolutions declaring that grant terminated. This claim is made upon the theory that since the Resolution of February 22nd, 1892, conferring the franchise in question, contained no provision as to the duration of the grant, the same is therefore terminable at will by either party. No cases can be found to support such a contention, and it is entirely incompatible with the law governing common carriers, that the latter must continue to serve the public, and cannot withdraw from their public employment. Most of the citations in the plaintiff's brief in the State Court have been quotations from decisions to the effect that legislative grants or franchises are to be most strongly construed against the grantee and in favor of the public. Such general language of construction, however, is of no assistance in determining an important concrete question such as we have before us in the present case.

Des Moines City Ry. Co. vs. City of Des Moines, 151 Fed., 854.

In this case at page 862, the court say:

> "Many cases of the highest authority are called to my attention to emphasize the undoubted and most familiar rule that a public grant must be given the construction most favorable to the public, when it is susceptible of two or more constructions. But neither the statutes or ordinances are to be frittered away by construction. Like contracts, they are to be held up, by the four corners, examined, and given a fair consideration."

This case was reversed solely upon jurisdictional grounds in 224 U. S., 175, but its principle of construction as to perpetuity of the grant has been affirmed several times by the Supreme Court, and nowhere is it more clearly stated than in this case.

(a) At the time of the conferring of the franchise in question, there was no limitation upon the duration of the grant which the Board of County Commissioners was authorized to confer.

In 1892, at the time the grant in question was created, Section 3438 of the Revised Statutes of Ohio, provided as to street railways and interurban railways, as follows:

> "The right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant, or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the County Commissioners, neither the municipal corporation nor the County Commissioners shall *release* the grantee from any obligations or liabilities imposed by the terms of said grant, or renewal of a grant, during the term for which said grant or renewal shall have been made."

There was no statute in force at this time placing any limit upon the duration of such a grant. As will be shown later herein under the discussion of the perpetuity of the grant, under such statutes, the County Commissioners had authority to confer a perpetual grant.

(b) The County Commissioners had no authority, reserved or delegated, or otherwise, to forfeit the grant in question.

We can do no better than to quote upon this point the language of Judge Jones in the dissenting opinion filed in this case, found at page 18 of the Record herein. In this opinion he says in part (Record, page 20):

> "It must be conceded that there is no statutory authority whatever for the County Commissioners to make such a revocation. Neither by the terms of the grant nor resolution of the County Commissioners to the predecessor of this defendant was there reserved such power. The question under consideration is highly important and I know of no adjudicated authority under the facts stated, which sanctions that view. No case has been cited in which this principle was sustained. The courts have held with practical unanimity that wherever one of the agencies of the sovereign power has endeavored to revoke a franchise which could only come from the state, it can be done only by virtue of the power directly delegated by the state or reserved in the grant itself, under such delegation.
>
> There is a wide distinction between the regulative powers incidental to municipal grants based upon the exercise of the police powers and the attempt, as in this case, to evict and destroy the public use. This distinction is plainly made in the case of the *Grand Trunk Western Ry. Co. vs. South Bend*, 227 U. S., *supra*.
>
> An examination of the revoking resolution of February 19, 1913, shows no complaint of the character of the use made as affecting the public welfare, but the resolution was based solely upon the claim to terminate the franchise at will, because it savored of perpetuity."

This feature of the case alone should be conclusive under the language of the cases hereinafter quoted, and especially of the following cases quoted below:

Grand Trunk Western Railway Company vs. South Bend, 227 U. S. 544.
Owensboro vs. Cumberland Telephone Co., 230 U. S. 58.
Boise Water Co. vs. Boise City, 230 U. S. 84.
Hudson Telephone Co. vs. Jersey City, 49 N. J. L. Rep. 303.

(c) The franchise in question is perpetual.

Except for the doctrine of the State of Illinois, that a franchise containing no provision as to duration confers a franchise for the life of the public corporation granting the same, and for one or two cases that hold that under such circumstances the grant is for the life of the corporation to whom the franchise is granted, the universal law is that such a franchise is perpetual. Under any of these three theories the defendant in this case is entitled to judgment in its favor, since the original corporation to whom the grant was made, and the granting corporation, are both still in existence. Under no theory of law adopted by the courts is the plaintiff entitled to judgment, and in reliance upon the great weight of authority in this country, we submit that the franchise in question is perpetual. In this connection, we call the Court's attention particularly to decisions of the United States Supreme Court quoted below, which have been published since the commencement of this present suit, to-wit:

Owensboro vs. Cumberland Tel. Co., 230 U. S. 58.
Old Colony Trust Co. vs. City of Omaha, 230 U. S., 100.
Boise Artesian Hot & Cold Water Co., Lmtd., vs. Boise City, 230 U. S., 84.

One of the reasons for the rule that a franchise such as the one in question in this case is perpetual, is that the grantee is a common carrier and cannot retire from the business of serving the public. In operating the interurban railway upon the highway between the cities of Canton and Massillon, this defendant is performing one of the public functions of the state which has been delegated to it; its railroad has been dedicated to the public use just as much as the highway itself, and simply enlarges the functions of that highway. Under such circumstances the general established rule of law, as shown by the following cases, is that a common carrier cannot retire from its public employment.

Paige vs. Schenectady Ry. Co., 178 N. Y., 102.

This is a case where a receiver of a street railway company in a mortgage foreclosure suit, took up and abandoned the street railway on Washington Avenue in Schenectady. He did this with the consent of the common council of the city, and a portion of the abutting owners who had consented to the original construction of the road, but without the consent of the company or its stockholders, and without the consent of the state.

> "Held: (1) That the receiver had no authority to abandon the road 'without consent of the company, of the stockholders, and the consent of the legislature of the state.' "
>
> (2) "Nor was the common council clothed with any authority to *compel* or to authorize an abandonment of any portion of such street railway. While its consent might possibly waive any right the city possessed to enforce or compel the enforcement of a continued operation of the road, still it could not, by any action on its part deprive the railway company of its rights, affect the rights of the stockholders, or the rights of the state and general public to require the company to continue the maintenance and operation of its railroad as originally constructed."

Thomas vs. West Jersey R. R. Co., 101 U. S., 71:

"Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over them were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature."

In accord:

People vs. Albany & Vermont R. R. Co., 24 N. Y. 261.

Bridgeton vs. Traction Co., 62 N. J. Law, 592.

Union Pac. Ry. Co. vs. Chicago Ry. Co., 163 U. S., 564.

State vs. Hartford & New Haven R. R. Co., 29 Conn., 538:

In this case the railroad company discontinued the running of passenger cars over a portion of its road. The court held that mandamus should issue to compel the company to restore the passenger service.

State vs. Spokane St. Ry. Co., 19 Wash., 518:

Syllabus: (1) "Where a street railway company attempts to discontinue the operation of a line, after acquiring the right and commencing the performance of the service, its duty to continue the operation of the railway may be enforced by mandamus.

(2) A street railway company which has occupied public highways for several years in the operation of its line without a grant or privilege or franchise from the municipality, cannot urge that objection for the purpose of relief against its enforced continuance to operate its line thereon, when its use and occupation of such highways has been undisturbed."

(d) **Authorities holding such grant to be perpetual, and such attempted forfeiture thereof to be in violation of the United States constitution.**

People vs. O'Brien, 111 N. Y., 1; 18 N. E., 692; 7 Am. St., 684; 2 L. R. A., 255.

In this case a grant by the city council to the street railway company contained no limitation as to the duration of the grant, and it was held that the grant was perpetual.

At page 260 (2 L. R. A.), the court say:

"The title to the streets of New York is vested in the city, in trust for the people of the state; but under the constitution and statutes, it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in public streets for a public use in perpetuity which should be irrevocable. *Yates vs. Van De Bogert,* 56 N. Y., 526.

Grants similar in all material respects to the one in question have heretofore been before the courts of this State for construction; and it has been quite uniformly held that they are grants in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for the purposes of a street railroad. *People vs. Sturtevant,* 9 N. Y., 263; *Davis vs. N. Y.,* 14 N. Y., 506; *Milhau vs. Sharp,* 27 N. Y. 611; *New York vs. Second Ave. R. Co.,* 32 N. Y. 261; *Sixth Ave. R. Co. vs. Kerr,* 72 N. Y., 330." • • •

"We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city under the authority of the Constitution and the Act of the Legislature. It is also well settled by the authority of this State that such a right constitutes property, within the usual and common signification of that word. *Sixth Ave. R. Co. vs. Kerr,* 72 N. Y. 330; *People vs. Sturtevant,* 9 N. Y. 263."

Of this case of *People vs. O'Brien,* Dillon on Municipal Corporations, Vol. 3, page 2053, says:

> "The rules laid down in the decision are of great and lasting importance, both to the public and to investors, and seem to the author to be founded upon principles of justice and right. The grant to the railroad company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only. No other view is consistent with the long line of decisions to the effect that such rights are property rights which cannot be destroyed or impaired by legislative enactment. These decisions have been rendered upon the assumption that when the grant has been made by legislative authority and accepted and acted on, it is beyond recall, and except as it is subject to the exercise of the police power, cannot thereafter be impaired by legislative enactment."

State vs. The Columbus Railway Company, I C. C. (n. s.), 145. Affirmed without report in 73 O. S., 363.

This was an action of quo warranto to oust the defendant, the railway company, from certain streets, upon the ground that its franchise had expired. The franchise in question contained no limitation of the time of duration and was granted prior to the time when there was any limitation on the duration of a franchise which a municipality might confer. Syllabus 3 of this case is as follows:

> "A franchise or privilege to construct and operate a street railway granted and consented to prior

to said act without limitation of time is perpetual, but subject to be determined by the General Assembly under Section 2 of Article I, or under Sections 1 and 2 of Article XIII of the Constitution."

At pages 163 and 164 the court say:

"It will be obserevd that the Legislature, by the acts already cited, provided that a street railway company, formed as therein authorized, shall be a body corporate with succession, and that it might mortgage its real and personal property and franchises, including the franchise of being a corporation. In view of these provisions and of the large expenditures necessary to such use of the streets, and of the fact that such use was comparatively new and the financial success of the venture uncertain, it would be unreasonable to conclude that it was the intention either of the Legislature, or of the city, or other agent of the state, to grant merely a license revocable at the pleasure of the city, and the conclusion is irresistible that it was the intention of the grantor to consent to such use of the street either in perpetuity, or for a reasonable time, or without limit of time, and in either event, the result must be the same in this action, for the state has not determined or limited the term and no attempt has been made to show what would be a reasonable time, and it is not apparent from the agreed facts; and if the grant is not from the state, but from the city, then we are of the opinion that the whole matter was committed to the city and that it might in its discretion grant in perpetuity, and that its grant being silent, as to time is in perpetuity, it being unreasonable to conclude that it was merely at pleasure. No case holding that a grant in perpetuity is void has been brought to our notice, nor any in which it is attempted to show that the reasoning upon which an exclusive grant is held void would require a like conclusion."

Junction Railroad Company vs. Ruggles, 7 O. S., page 1.

This was an action by the Railroad against the owner of property across which its right-of-way was being extended, to enjoin the land owner from interfering

with the construction of the road. Almon Ruggles executed an instrument in the form of a deed, but not acknowledged and attested as required by the Ohio State statute, quit-claiming to The Ohio Railroad Company so much of his land as the Railroad Company was authorized by statute to appropriate for and in consideration of the location of the Railroad upon the same. The deed ran to The Ohio Railroad Company without mentioning the words "successors or assigns," and contained nothing to indicate the duration of the grant, or that the grant might be assignable. The Court held that the grant was perpetual and assignable. At page 6 the Court say:

> "The instrument executed by Almon Ruggles to the Ohio Railroad Company, was more than a mere license revocable at will. It wanted but a more formal execution, to render it a legal conveyance of a perpetual easement in such lands as the grantee might appropriate in conformity to its terms. The Ohio Railroad Company having accepted the grant and complied with the conditions on which it was made, would, by virtue of this instrument, at least be entitled to enforce such legal conveyance; and regarding as done that which ought to be* done, we treat the instrument, for the purpose of this suit, as if it were a formally executed legal conveyance. *Wilson vs. Chalfant*, 15 Ohio, 248. The instrument itself containing no limitation as to time, the duration of the easement granted would be perpetual, unless terminated by a release or abandonment."

This decision is applicable to the present case, since such a grant from the State or one of its subsidiaries is likewise a typical easement.

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296. Judge Lurton at page 299 says:

> "The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires, and equipment of an electric street railway is a grant of a typical easement in property, and as such

is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned, or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights."

Grand Trunk Western Ry. Co. vs. City of South Bend, 227 U. S., 544.

This was an action to enjoin the city of South Bend from interfering with the building of a double track by the plaintiff upon Division Street. In 1866 the city of South Bend had passed an ordinance granting the company the right to construct a railroad through the streets of the city, with the privilege of placing a double track upon Division Street. Shortly before the suit in question, the city passed an ordinance repealing the part of the grant giving the railroad the right to lay a double track, and threatened to arrest any of the plaintiff's employes who attempted to place a double track upon that street. The original ordinance conferring the right to lay tracks upon the city streets, contained no provision as to the duration of the grant. The State trial court sustained a demurrer to the bill, which was affirmed by the Supreme Court of Indiana, and from this judgment the case was carried to the Supreme Court of the United States, which reversed the decision of the State court, on the ground that the franchise of the railroad was *perpetual.*

At page 555, the Supreme Court of the United States say:

Mr. Justice Lamar:

"The power to regulate implies the existence and not the destruction of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, *which, as it contemplated permanent and not temporary structures, granted a permanent*

and not a revocable franchise. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent, except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition predecent had been performed and the street franchise was thereafter held, not from the city, but from the State *which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself.*"

At page 557, the court conclude:

"Obviously upon the clearest consideration of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside. *St. Louis vs. Western Union Telegraph Co.,* 148 U. S. 92, 103."

Owensboro vs. Cumberland Telephone Co., 230 U. S., 58.

This case came before the Supreme Court of the United States from the United States Circuit Court of the Western District of Kentucky. It was an action by the telephone company to enjoin the enforcement of an ordinance of the city, purporting to terminate the franchise of the telephone company to maintain telephone poles and wires upon the city streets. The telephone company claimed the right to occupy the streets by virtue of an ordinance conferring that right, which contained no limitation as to the duration of the grant. As in the case at bar, also the state statutes conferring authority upon the city to grant such a franchise, contained no limitation as to the duration of a franchise which the city might grant. The lower court granted

a permanent injunction against the enforcement of the repealing ordinance, upon the ground that the telephone company's franchise was perpetual.

At page 64, the Supreme Court say:

Mr. Justice Lurton:

1. "That the right conferred by the ordinance involved is something more than a mere license, is plain. A license has been generally defined as a mere personal privilege to do acts upon the lands of the licensor of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given, have been made. See *Greenwood Lake & P. J. Rd. vs. New York, &c., Railroad,* 134 N. Y., 435, 440; *Trustees of Southampton vs. Jessup,* 162 N. Y. 122, 126.

That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal, *nor for a temporary purpose.* The right conferred came from the state through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all of the police power of the city.

That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases: *Detroit vs. Detroit St. Ry. Co.,* 184 U. S. 368, 395; *City of Louisville vs. Cumberland Telephone & Telegraph Co.,* 224 U. S. 649, 661; *Boise Water Co. vs. Boise City,* opinion was handed down, post, page 84. *As a property right it was assignable, taxable and alienable.* Generally it is an asset of great value to such utility companies and a principal basis for credit.

2. * * * *If there be authority to make a grant and it contains no limitations or qualification as to*

duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights."

The court then quoted in full, with approval, the extract given above herein from Dillon on Municipal Corporations.

At page 76, the opinion concludes:

"We find no error in the decree of the court below and it is, therefore, affirmed."

The dissenting opinion in this case was based upon the theory that the municipality had been delegated by the Legislature authority to revoke and repeal such a grant and that that right was, therefore, a part of the grant or contract. The dissenting opinion therefore, does not apply to the case at bar since the County Commissioners never had such authority.

Boise Artesian Hot & Cold Water Co., Limited, vs. Boise City, 230 U. S., 84.

This case came before the Supreme Court on error from the United States District Court for the District of Idaho. The suit was an action by the water company for water rates, and the city set up a counter-claim for certain license fees. The water company denied the validity of the license fees upon the ground that it was operating under a franchise created by an ordinance containing no stipulation as to duration; that, therefore, the franchise was perpetual and could not be altered by the license fee ordinance. The District Court held that the

franchise containing no provision as to duration was a revocable license, and, therefore, sustained the counter-claim for license fees. The Supreme Court of the United States reversed this judgment upon the ground that the company's franchise was perpetual, and the license fee ordinance was a violation of property rights.

Syl. 2. "Rights acquired under an ordinance granting the right to a water company to lay and maintain pipes in the streets is a substantial property right, with all the attributes of property; and the obligation of the contract in the ordinance on which it is based is protected against impairment by the contract clause of the Constitution of the United States.

Syl. 3. There is a presumption that investments of large amounts of capital in a public utility enterprise will not be made on a franchise for necessary use of the streets, which is a mere license revocable at will.

Syl. 4. Where there is no limitation in the general law of the state, nor in the character of a city, as to duration of franchises for public utilities in the streets, the grant of the easement for that purpose not specifying a period of duration, is in perpetuity."

Old Colony Trust Company vs. City of Omaha, 230 U. S., 100.

This was an action by the trustee of a deed of trust of an electric light company, commenced in the Federal District Court of Nebraska, to enjoin the enforcement of a resolution of the city council ordering the electric light company to discontinue the furnishing of electricity for heat or power purposes. The plaintiff contended that since the franchise in question contained no provision as to duration, it was therefore perpetual. The trial court rendered judgment in favor of the city, but this decree was reversed by the Supreme Court of the United States.

The opinion of this court is well summed up in the following Syllabi:

1. "A municipality, being a creature of the state, derives its power from the laws thereof, and is within the influence of the decisions of the state's court of last resort.

2. Under the laws of Nebraska, as construed by the highest courts of that state, municipalities had the power in 1884 of granting licenses to use the streets for public purposes; and in the absence of specific limitations of duration, such licenses were in perpetuity and conveyed rights of property within the protection of the contract clause of the Constitution of the United States.

3. Such grants are subject to reasonable police power of the state and forfeitable for acts of abuse or non-user; but they cannot be taken away or impaired arbitrarily.

8. The practical interpretation of a contract by the parties thereto for a considerable period before a controversy arises is of great, if not controlling, influence; and this rule is applicable in Nebraska as in the nature of estoppel.

9. Acquiescence by the municipality in the extension of a franchise for electric light to distribution of electricity for power and heat evidenced, as in this case, by collection of taxes imposed on receipts therefrom and the purchase by the city of current for power, *held*, to entitle those who had advanced money on the security of the franchise to insist upon the recognition of the right of the corporation, and the continuance of that right, to supply electricity for power and heat as well as light; and an ordinance requiring the corporation to discontinue such distribution of heat and power is void under the contract clause of the Constitution of the United States."

In accord:

State ex rel. Hudson Telephone Co., Prosecutor vs. Mayor and Aldermen of Jersey City, 49 New Jersey Law, 303.

Inhabitants of East Orange vs. Suburban Electric Light & Power Company, 59 New Jersey Equity, 563.

City of Seattle vs. Columbia & Puget Sound Railroad Co., 6 Wash., 379.

Port of Mobile vs. L. & N. Railway Company, 84 Alabama, 115.

Woodhaven Gas Light Co. vs. Deehan, 153 N. Y., 528.

Town of Arcata vs. Arcata R. R. Co., 92 Cal., 639.

Nebraska Telephone Co. vs. Fremont, 72 Neb., 25.

Plattsmouth vs. Nebraska Telephone Co., 80 Neb., 460.

Fellows vs. Los Angeles, 151 Cal., 52.

City of Louisville vs. Cumberland Valley Tel. Co., 224 U. S., 649.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650.

Citizens Ry. Co. vs. Detroit Ry. Co., 171 U. S., 48.

Detroit vs. Detroit St. Ry. Co., 184 U. S., 368.

Turnpike Company vs. Illinois, 96 U. S., 63.

Mercantile Trust Co. vs. Denver, 161 Fed., 769.

REBUTTAL OF CASES CITED BY THE PLAINTIFF.

One of the cases cited in plaintiff's own brief filed in the State Court supports our contention that the franchise in question is perpetual. We refer to the case of

Railroad Company vs. Defiance, 52 O. S., 262; 167 U. S., 88.

At page 94 of 167 U. S. Reports, the Supreme Court say:

> "The only contract as to time which could possibly be extracted from this ordinance would be, that the railway company, on building the bridges and approaches, should be entitled to maintain them in perpetuity."

The court, however, declined to decide whether or not the ordinance constituted a contract, but said at page 95, "conceding for the purpose of this case all that is claimed by the railroad company," the city council had no power to make such contract as would denude itself of the power to supervise and control its streets.

The case simply holds that where permission is given to a railway company to erect bridges across its right-of-way which carry the said streets about eighteen feet above the level of the railroad, the city is not thereby barred from changing the grade of these streets. Certainly that decision is not antagonistic to the contention of the defendant in this case, for clearly a grantee of rights in a street or highway, whatever the duration of the grant, takes the same subject to the primary purposes of the streets and highways. We are not contending that the County Commissioners could not, if they chose, alter the grade of the highway between Canton and Massillon.

Blair vs. Chicago, 201 U. S., 400, cited in plaintiff's brief in the State Court.

In this case, the Supreme Court of the United States simply held that a franchise authorizing an *extension* of a street railroad, no time of duration being mentioned, did not have a longer life than the original grant.

McCune vs. Norwich City Gas Co., 30 Conn., 521. Cited in plaintiff's brief in the State Court.

In this case, the court says:

> "The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it."

This language furnishes the sufficient distinction, which we will consider later in regard to the case of *The East Ohio Gas Company vs. The City of Akron,* that a gas company is not a common carrier, and may, therefore, retire from its business, or a part thereof. The plain-

tiff's contention in this case was simply based upon the claim that the gas company was a common carrier. No claim was made as to any contract or franchise of the company. The court did not consider the duration of the gas company's contract with the municipality.

East Ohio Gas Company vs. City of Akron, 81 O. S., 33.

There are several decisive distinctions between this case and the present case.

In this case, the City of Akron under authority of Secs. 2478 and 2479 of the Revised Statutes of Ohio, had fixed the price which The East Ohio Gas Company might charge for gas for a period of ten years. This period had expired, and the City Council of Akron passed an ordinance fixing the gas rates for the next ten years at a rate which the gas company refused to accept. The gas company then declared its intention to withdraw from doing business in the City of Akron, and the City of Akron brought this suit to enjoin the gas company from so withdrawing.

The court simply held that the gas company could not be compelled to accept rates fixed by the city council, and that if an agreement could not be reached as to price between the gas company and the city council the gas company might withdraw.

1. **Mutuality.** A very important distinction between that case and the present case is that (as shown in the city's brief at page 44 of the report), the city by the ordinance creating the gas company's franchise in Akron "reserved to itself the right to avoid the franchise offered and resume its control of its streets." Counsel for the city contended that "the option to do this was that of the city and not of the plaintiff." In other words, by the express language of the grant to the gas company, the same was revocable at the will of the city, and counsel for the city was endeavoring to main-

tain that in spite of this it was perpetual as to the gas company. Clearly such an argument was anomalous, since the duration of the grant, to meet the requirement of mutuality, must be the same as to both parties. It was to this matter that the Supreme Court of Ohio referred when it said at page 52:

> "But if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no *corresponding* stipulation in favor of the company."

We submit that this feature of that case completely distinguishes it from the present case. Since by the terms of the franchise itself, it was terminable at will by the city, and was silent as to the duration of the grant so far as the gas company was concerned, for the sake of mutuality, the necessary implication is that it was revocable at will by the gas company. In the present case, however, the board of County Commissioners did not reserve, nor had they been delegated by the state legislature, any right to revoke this defendant's franchise, and it is silent as to duration as to both parties.

2. **Statutory Distinction.** As shown above there was no statutory limitation upon the duration of an interurban franchise which the County Commissioners of Stark County could confer. The City of Akron, however, under Secs. 2478 and 2479 of the Revised Statutes of Ohio was only authorized to fix the price of gas for the period of ten years, and these statutes were necessarily a part of the original contract between the gas company and the city, under which the former placed its pipes in the city streets. In that case, therefore, the Supreme Court was considering a contract between the city and the gas company, in which a most vital element, to-wit, the price of gas, could only be fixed for ten years, and might be changed by the city at every ten-year period. On account of this peculiar and vital element of the contract,

therefore, even if the grant to the gas company was silent as to duration, it could not reasonably be deduced from the contract that the gas company had agreed to furnish gas perpetually at whatever price the city council might fix, since, as will be considered below, the gas company was not a common carrier, and, therefore, had not perpetually dedicated itself to public service.

Furthermore, Sections 2478 and 2479 of the Revised Statutes of Ohio, being a part of any gas franchise conferred by the city, necessarily restrict the duration of any such franchise to the term of ten years.

City of Wellston vs. Morgan, 59 O. S., 147.

In this case, the court held absolutely void a franchise to a gas company for the period of ninety-nine years. It was argued to the court that the ordinance creating the franchise in question was at least valid for the term of ten years. In reply to this, the court say, at page 156:

> "Now, the language of the statute is that the municipalities referred to shall have power to contract for light for any term not exceeding ten years. This implies, with as much force as if it has been expressly stated, that the municipality shall not have power to contract for any term longer than ten years, and the natural inference is, we think, that the purpose is to inhibit such contracts entirely, for the only certain way of insuring their non-enforcement is to prevent their attempted execution. This may not be effectually accomplished unless they are held to be void."

What the court really held, therefore, in the case of The East Ohio Gas Company against The City of Akron, was that the franchise in question was for a term of only ten years, and that the gas company could not be compelled to furnish gas after the expiration of that term unless a new agreement was voluntarily entered into for another period of ten years. This was clearly the only equitable result which the Court could have reached un-

der the peculiar circumstances of that case. It is to be especially noted that the Ohio Supreme Court expressly declined to consider the question of whether the grant was perpetual. That question was not involved in that case on account of the peculiar circumstances above mentioned.

3. Another important distinction is that the gas company was not a common carrier. From the very nature of its business of supplying gas from natural wells which might become exhausted at any time, it could not possibly have been deemed to have perpetually dedicated its property to public use, or to have agreed to supply gas in the city of Akron perpetually.

The case of *McCune vs. Norwich City Gas Co.*, 30 Conn., 521, quoted in plaintiff's own brief in the State Court, and considered hereinbefore, holds that a gas company is not a common carrier, but may withdraw from business at any time. We are satisfied with this authority of the plaintiff in support of our contention that the gas company is not a common carrier.

On the other hand, however, as is already shown herein by the citation of authorities, this defendant, and its predecessors in title, were and are common carriers, and the street railway between the cities of Canton and Massillon has been perpetually dedicated to the public use. The grant in question being silent as to duration, therefore, under the authorities above quoted, it is to be considered as co-extensive with the dedication of the grantee's property, to-wit, in perpetuity.

This disposes of all of the cases cited by the plaintiff in the State Court. The ones not specifically referred to herein are simply quotations to the effect that a public grant is to be most strongly construed in favor of the public, but these quotations have already been disposed of by the emphatic language of the Supreme Court of the United States, and other authorities quoted herein.

IV. THE GRANT IN QUESTION WAS ASSIGNABLE AND THIS DEFENDANT IS THE OWNER THEREOF.

This proposition seems to be conceded by the plaintiff, since it was not considered in his brief and was not argued before or considered by the Ohio Supreme Court. We will, therefore, pass over this matter without further consideration than to call to the Court's attention the three following matters, to-wit:

1. As shown in the statement of facts herein, the Board of County Commissioners in the Reedurban grant, recited that the franchise in question was assignable, and that The Northern Ohio Traction & Light Company was the owner thereof.

2. The statutes of Ohio authorize the assignment and transfer of all franchises and properties of an interurban railroad. (Gen. Code, Secs. 9134, 9135, 9136 and 9137.)

3. The case of *The State of Ohio, ex rel. Charles Krichbaum, Prosecuting Attorney of Stark County vs. The Northern Ohio Traction & Light Company,* 15 O. C. C. (n. s.), 577, held that the grant in controversy in this suit was assignable, and that decision is not only *res judicata,* but is sound in its logic, and quotes numerous authorities in support of that proposition.

In the case of *Junction Railroad Company vs. Ruggles,* 7 O. S., page 1, cited above, among the authorities supporting the perpetuity of the grant in question, this same question of assignability was before the Court, and the Court held that although no words of assignability were contained in the grant, the grant was, nevertheless, assignable.

V. THE COUNTY COMMISSIONERS ARE ESTOPPED TO DENY THE PERPETUITY AND ASSIGNABILITY OF THE GRANT.

As set forth in the statement of facts herein, the County Commissioners of Stark County, Ohio, for more than twenty-one years have sat by and witnessed in silence the various assignments of the railroad and franchise in question, the wide sale of stocks and bonds secured by that railroad and franchise, and the investment of large sums of money, realized from such sales, in the construction and improvement of the railroad in question. They have also witnessed in silence the building up of the wide-spread interurban railroad system of this defendant, and the extensions of the electric railway systems of Canton and Massillon, of all of which the railroad in question is an integral and essential part. Incalculable numbers of improvements and investments in property have been made by the public in the vicinity of Canton and Massillon, the value of which depends upon the continued operation of this railroad, and which must have been made in reliance upon the permanency of this railroad. In spite of all these manifestations that the various railroad companies owning the franchise, and the general public, considered the franchise in question to be a perpetual and permanent thing, rather than a mere shadow of right which might be swept away at the whim of the County Commissioners, never until 1912 did the Commissioners assert that the franchise in question was terminable at will. Surely at this late day they are estopped to set aside the interpretation of permanency that for years has been placed upon the franchise by the public and all parties concerned, and cannot now destroy property and contract rights purchased by the public in reliance upon the assignability and permanency of this franchise.

Supplementing the general doctrine of estoppel, is the well-established law of contracts, that the interpretation placed upon a contract by the parties interested therein will control the construction of that contract by the courts.

City of Louisville vs. Cumberland Tel. Co., 224 U. S., 649.

State ex rel. Hudson Tel. Co., Prosecutor vs. Mayor and Aldermen of Jersey City, 49 N. J. Law, 303.

City of Seattle vs. Columbia & Puget Sound Rd. Co., 6 Wash., 379.

Port of Mobile vs. L. & N. Ry. Co., 84 Ala., 115.

Old Colony Trust Co. vs. Omaha, 230 U. S., 100 (at p. 119);

State ex rel. vs. Lincoln St. Ry. Co., 80 Neb., 333 (at p. 343).

State vs. Citizens' St. Ry. Co., 80 Neb., 357 (at 360).

Omaha St. Ry. Co. vs. City of Omaha, 90 Neb., 6.

For a more particular consideration of the authorities on this point, we refer the Court to the brief filed herein by the defendant, The Cleveland Trust Company.

VI. THE DECISION OF THE CIRCUIT COURT OF STARK COUNTY CONSTITUTES RES JUDICATA AND AN ESTOPPEL UPON THE PLAINTIFF TO MAINTAIN THIS ACTION.

The present suit is barred by the prior adjudication of the Court of Appeals of Stark County in the above mentioned case of The State of Ohio, ex rel. Charles Krichbaum, Prosecuting Attorney of Stark County, Ohio, against The Northern Ohio Traction & Light Company, a corporation. The parties to these two suits are identical, and the causes of action in both cases are the same, and, therefore, the prior judgment of the Court of Appeals, sustaining the defendant's demurrer to the relat-

or's petition, and dismissing the same, is a complete bar to this action. Furthermore, the said Court of Appeals in dismissing the former suit, expressly passed upon and decided in favor of this defendant all of the questions raised in the present case, and the plaintiff is therefore estopped by reason of that adjudication to again raise those questions in this suit.

This Honorable Court takes judicial notice of the reported decisions of the courts of the State of Ohio, and we call the Court's attention not only to the record of this former case as fully set forth in the record herein, but also to the reported decision of that case, to-wit:

> *State of Ohio, ex rel. Charles Krichbaum, Prosecuting Attorney of Stark County vs. The Northern Ohio Traction & Light Company,* 15 O. C. C. Rep. (n. s.), 577.

We call the Court's attention to the following Syllabi of the above case:

> "1. A resolution adopted by the board of county commissioners, granting to the person named therein the right to locate, construct, maintain, and operate an electric railway along a public highway, is not any the less a continuing contract because of the omission of terms in the grant which authorize a transfer to others of the rights therein granted; but the covenant in such a case must be regarded as a grant which runs with the land or subject matter of the contract, and the addition of the word 'assignee' or 'assigns' is not necessary to make the covenant effective to all persons to whom the property or rights may pass.
>
> 2. When a franchise or contract rights have been granted by an exercise of power duly conferred and such rights have become vested, no amendment or alteration of the charter or contract can take away the property or rights so vesting; and where the grant is without a time limit, and there are no limitations upon the powers of the commissioners making the grant, the rights so conferred are not a mere grant at will, but are indeterminate or *perpetual*, and cannot be terminated by the commissioners, nor can

such rights always be revoked by the General Assembly."

At page 583 the court say:

"This cause was submitted to this court on the demurrers of the defendant.

The plaintiff sets out at great length the various proceedings had by the commissioners of this county in regard to the occupation of said road by said defendant company.

The action is a very important one, not only as to the property rights involved, but also as to the interests of the general public therein. The case has been ably argued, both by written briefs and in oral argument. In the short time that the court has had to consider the questions submitted on the demurrers, it cannot be expected that the court will enter into extended reasons for the conclusions it has reached, but its conclusions will have to be in many respects dogmatically announced for want of time to give the reasons therefor. In stating the facts set forth in the petition we have epitomized an analysis of the petition in order to present the material questions raised by the demurrers in the case.

It is contended by the plaintiff that the resolution adopted by the board of commissioners on February 22, 1892, granted to William A. Lynch and to such railroad company as he might cause to be incorporated for that purpose the right to locate, construct, maintain and operate an electric railroad along said highway running between the cities of Canton and Massillon.

It is contended that this resolution if it is to be considered as a contract, is only personal to William A. Lynch, and therefore could not be transferred or assigned by him to any other person or corporation, for the reason that it lacked terms in the grant that would authorize the transfer by him of said privileges granted to him by the resolution of February 22, 1892. In other words, the omission of the words 'successors or assigns' made the contract or grant only personal to said William A. Lynch and an assignment or transfer of the grant by him to any person or corporation would be void.

The covenant or grant given by the county commissioners to said William A. Lynch, and to such railroad company as he might cause to be incorporated to locate, etc., an electric railroad on said road or highway, was authorized by a statute in force at the time the grant was given, said statute being Section 9101, General Code of Ohio, and is a covenant or grant that runs with the land or subject matter of the contract, and the word 'assignee' or the word 'assigns' is not necessary to make the covenant effective as to all persons to whom the property or rights pass."

After citing several authorities, the court continue at page 585:

"There being no conditional limitations upon the powers of the commissioners granting the franchise, they could grant privileges which were perpetual or for a definite period which might extend beyond the corporate life of the grantee. Since in this grant there was no time limit the privileges are perpetual. When under power in a franchise or contract rights have been acquired and become vested, no amendment or alteration of charter or contract can take away the property or rights vested under the legitimate exercise of the powers granted.

'Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this case, and this franchise is not void, as a consequence thereof.' Booth on Street Railroads, Sec. 17, and authorities there cited.

It is further contended that the grant to Mr. Lynch was without a time limit and therefore a mere grant at will, and that the commissioners could terminate the same at any time they saw proper to do so.

In support of this contention on the part of the plaintiff, we are cited to the 81st O. S., pages 33 and 53, as sustaining this contention.

We are of the opinion that the case of The East Ohio Gas Company vs. City of Akron, 81 O. S., supra, does not apply in this case. That a corporation like the corporation in the 81st O. S., is of a different nature than a corporation for public service, such as

an electric railroad company or a railroad company, and therefore the principles announced in the 81st O. S. do not apply, but rather the principle recognized in the case of State, ex rel. Taylor vs. The Columbus Railway Company, 1 C. C. (N. S.), page 145, does apply in this case. In that case it is held, that a franchise or privilege to construct and operate said railway granted and consented to without limitation of time, is perpetual, subject only to be terminated by the General Assembly, under Section 2, Article 1, or Sections 1 and 2 of Article XIII, of the Constitution of the State. Consent given without limitation or time to a corporation is not always revocable even by legislative authority. The case of City of Detroit vs. Detroit & F. Plankroad Company, 43 Mich., 140, we cite in which Judge Cooley says:

> 'It cannot be necessary at this date to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightly have acquired.'

The Commissioners in this state, having granted to William A. Lynch the right to occupy said public highway, fixing no time limit for its occupancy and permitting improvements to be made with reference thereto, are without authority to revoke said right and the grant is indeterminate."

The court concludes at page 589:

> "Therefore, the demurrer as to the statute of limitations is overruled; but we hold that the general demurrer is well taken, and that the plaintiff has no cause of action and that the plaintiff has not the legal capacity to bring this action. Therefore, the general demurrer is sustained on the ground that the petition does not state facts sufficient to constitute a cause of action, and the special demurrer that the plaintiff has not the capacity to bring the action is also sustained."

Three things are evident from the above decision:

1. The petition therein stated the same cause of action as the petition in the present case. It is true that the action in the former case followed the passage of the resolution of the County Commissioners on *March 27th, 1912*, declaring the grant in question terminated, whereas, the present case follows a resolution of said Commissioners of *February 19th, 1913*, **again** declaring the grant terminated. Clearly, however, the passage of the second resolution subsequent to the former adjudication cannot create a new cause of action, since the cause of action is based not upon the terminating resolution, but upon the original grant of 1892. If this were not true, the County Commissioners might pass such resolutions an indefinite number of times as often as they are defeated in a court of law, and thus keep in litigation forever the same public question.

2. It is also evident from the above report that the Court of Appeals of Stark County, in the former suit, passed upon the merits of the present cause of action, when it sustained the defendant's demurrer. The only argument made in the relator's brief in the State Court as to *res judicata* was that the sustaining of a demurrer to a petition is not necessarily a decision upon the merits. The report of the above case shows the inapplicability of that argument in the present case.

3. It is further evident that the Court of Appeals in the former case decided the very questions, raised in the present suit, to-wit: the assignability and the perpetuity of the franchise. This, as we shall show later, constitutes an estoppel upon the plaintiff, independently of the identity of causes of action.

It is a fundamental proposition that a final judgment upon a cause of action is forever a complete bar to a suit between the same parties upon the same course of

action. Otherwise, a judgment of the courts would be futile. Moreover. it is equally well established that if the parties to the suits are identical, even though the two suits pending do not involve the same cause of action or the same subject matter (which is not the case in the present controversy), so that the former judgment cannot be set up as a complete bar, nevertheless the judgment of the former case as to all questions actually decided therein, constitutes to that extent an estoppel between the parties. Neither of the parties as against the other can ever again open up the questions actually decided between them or necessarily involved in the decision in the former case.

Cromwell vs. County of Sac, 94 U. S., 351.

"In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore,

which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In accord, *Fayerweather vs. Ritch,* 195 U. S., 26.

Hixon vs. Ogg, 53 O. S., 361:

Syllabus: "Where issue has been joined on a material fact in an action, and the issue judicially determined and carried into judgment by a court having jurisdiction of the action, the parties to such action are concluded by such finding until the judgment is reversed or set aside. And the facts thus established cannot be retried by the same parties in any subsequent action, whether second action is upon the same or a different subject matter from the first. In this respect it is immaterial that one of the actions may have been *ex contractu* and the other *ex delicto.*"

At pages 366 and 367 the court say:

"The general rule established by the uniform current of authority, is that an issue, once tried, decided and carried into judgment works an estoppel, and cannot be relitigated by the same parties in a

subsequent action, though the subject of the two actions are different. Perkins vs. Walker, 19 Vermont, 145; Betts vs. Starr, 5 Conn., 550. In the latter case Bristol, J., laid down the rule as follows:

> 'Where the cause or object of two actions is different, though the matter or point in dispute is the same in both, a prior judgment is no bar to a subsequent action; but the verdict may be matter of evidence to prove such point in dispute. * * * For although the object and purpose of two actions being different, the judgment in one, cannot be used by way of bar to the other, it does not follow that in the second action, either party can be permitted to contradict what was expressly adjudicated in the first.' Ib. 553. 'A decision upon any material point is conclusive, though the subject matter of the two suits is different.' Freeman on Judgments, Vol. 1, Sec. 253. 'A judgment is conclusive, not only as to the subject matter in suit, but as to all other suits which, though concerning other matter, involve the same questions of controversy.'"

Ib. "In Bigelow on Estoppel, page 99, the rule is announced in the following language: 'A matter of fact * * * once adjudicated by a court of competent jurisdiction, concurrent or exclusive, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court * * * and this, too, whether the subsequent suit is upon the same or a different cause of action.'"

Page 368: "Nor is it material in this respect that one of the actions may be *ex contractu*, while the other sounds in tort. In the nature of things, if the facts upon which different causes of action rest, have no connection with each other, a fact established in the action first tried, cannot effect the subsequent action; for the obvious reason that such fact would be immaterial in respect to the latter action; but where certain facts are common and material to both actions, the subject matter of the two actions are connected to that extent, whether both be *ex contractu*, both *ex delicto*, or one founded on contract and the other in tort. And if, in such case, the com-

mon and material fact has been judicially ascertained in the action first tried, it should be regarded as established in respect to the other action, so long as the judgment remains in force."

In accord:

Martin, et al. vs. Roney, et al., 41 O. S., 141.
Grant vs. Ramsey, 7 O. S., 157.
City of Cincinnati, et al. vs. Emerson, 57 O. S., 132.

The only contention of the relator in the brief filed in the State Court as to *res adjudicata*, was that "this case was not tried on the merits, and, therefore, is no bar or estoppel to the present case." In support of this contention, the relator cites the case of *Moore vs. Dunn*, 41 O. S., 62, and three other decisions, one of the Ohio Circuit Court, the other two of foreign jurisdictions, following the decision of *Moore vs. Dunn*. The inapplicability of those cases to the present case, however, is shown by the syllabus of *Moore vs. Dunn, supra*, which is as follows:

"In an action by M. against D., demurrer to the petition was sustained for want of a material averment therein, and M. failing to amend, judgment was given for D.

M. afterwards brought another action against D., upon the same cause of action, and in his petition supplied the material averment wanting in the petition in the first action.

Held: That the judgment in the first action was not a bar to the cause of action alleged in the second one."

In this case and the other cases cited in accord with it in the plaintiff's brief, it affirmatively appeared in the record that the former adjudication did not pass upon the merits, but that the demurrer in the former case was based upon defective pleading, which was later corrected in a new action. In the present case, however, it affirmatively appears, both by the record of the former case and by the published report of its decision, that the

former adjudication did pass upon the merits, decided all questions involved in the present case, and no new material averments are added in the petition in the present case.

The Ohio doctrine upon the matter of *res judicata* as a complete bar to a later action, is well summed up in:

Black on Judgments, Vol. 2, Sec. 722.

> "And in certain decisions of the Supreme Court of Ohio, a distinction is made between cases dismissed on a hearing and those put out of the court before the hearing on the merits. Where the question is whether a bill was dismissed upon the merits or for want of prosecution, and the ground of dismissal is not stated, and nothing is found in the record from which it might be discovered by inference, according to these authorities there is no presumption either way. The consequence of which is, that, as it must be established that the dismissal was upon the merits, and that fact cannot be presumed, there is no bar unless it is affirmatively shown. But where it appears that the dismissal was upon a hearing of the case, it is to be inferred that it was upon the merits. It is further held, in that state, that where, in an action at law, a former decree in chancery dismissing a bill generally, is relied upon as an estoppel *per se* as to the matters set up in the bill, and it appears from the record that the bill may well have been dismissed for want of jurisdiction, the decree will not estop the plaintiff therein from proving, in the suit at law, the matters relied on in the bill."

Since it affirmatively appears in the present case that the Court of Appeals in the former case did pass upon the merits, the exceptional doctrine of *Moore vs. Dunn, supra*, cannot apply. Furthermore, the case of *Moore vs. Dunn*, was only passing upon the question of a prior adjudication as a complete bar to subsequent action. It has no applicability to the doctrine of estoppel of *Cromwell vs. County of Sac*, and *Hixon vs. Ogg, supra*. Under these latter cases, since it affirmatively appears that the Court of Appeals in the former case did decide that the

defendant's franchise was perpetual and not terminable at will, and was assignable, the plaintiff is estopped to again raise those questions as against this defendant.

The only other case cited in plaintiff's brief upon this question of *res adjudicata* other than those above mentioned, was the case of *State ex rel. Attorney General vs. The Cincinnati Gas-Light & Coke Company*, 18 O. S., 264.

In this case, it is to be noted that the defendant set up in its answer as a bar to the action, a judgment sustaining a demurrer to a former petition brought by a prosecuting attorney upon the relation of a private individual. Upon demurrer to this defense, the court simply stated that the former judgment upon demurrer was not final and conclusive so as to be a *bar* to the later action. It does not appear from the report of this case whether or not the demurrer in the former action was sustained upon the merits, or merely upon some jurisdictional or defective pleading matter. Furthermore, it is to be noted that the former adjudication was set up as a complete bar, no question of estoppel was involved, and it did not appear that any specific question was actually passed upon in the former adjudication which was later involved in the subsequent suit. For these reasons the case can be disposed of by classing it, as does the plaintiff's brief, as similar to the decision in the case of *Moore vs. Dunn, supra.* It has no bearing upon the present case, because in the present case, it affirmatively appears that the former adjudication went to the merits of the cause of action and actually disposed of all the questions raised in the present action.

The plaintiff's brief did not claim for this case, and the report of the decision does not sustain such a proposition, that the case of *State vs. Cincinnati Gas-Light & Coke Company* holds that the doctrine of *res judicata* does not apply to *quo warranto* proceedings. Nowhere

in the report of the case or in the syllabus can the statement of such a proposition be found, nor is that the law.

Blackstone in his Commentaries, Vol. 3, page 263, says:

> "The judgment on a writ of *quo warranto*, being in the nature of a writ of right, is final and conclusive, even as against the Crown."
>
> "And such substantially," say the court, in Shumate vs. Supervisors, 84 Va., 574, "is the effect of a judgment in the more modern proceeding, by information in the nature of a *quo warranto*."

In accord are:

McClesky vs. State, 4 Tex. Civ. App., 322; 23 S. W., 518.

People vs. Holloday, 93 Cal., 241; 27 Am. St. Rep., 186.

State vs. Kennedy, 60 Neb., 306; 83 N. W., 87.

Gas-Light Company vs. Zanesville, 47 O. S., 35.

In this last case, two suits were pending before the Supreme Court, between the City of Zanesville and the Gas-Light Company, both involving the power of the City Council, by ordinance, to fix the price of gas. At page 49 the court say:

> "It will be seen that both suits were practically pending from the same time, and whilst each was prosecuted for a different purpose by the party bringing it, both turned upon substantially the same question—the power of the city council by ordinance to fix the price at which the company should furnish gas. So that each turning upon the same question of law, no good reason is perceived why a judgment in either, *remaining unreversed*, should not be regarded as conclusive upon the rights of the parties in the other suit."

A municipality is just as much a political subdivision of the state and representative of the state, as is Stark County, its Commissioners and Prosecuting Attorney, and the doctrine of this last quoted case, therefore, as to estoppel, governs the present case, and holds that the

doctrine of *res judicata* and estoppel is applicable to a representative of the state. Even if for the sake or argument the most favorable view for plaintiff be taken of said case of *State ex rel. Attorney General vs. The Cincinnati Gas-Light & Coke Company,* it cannot apply to the present case, since in the present case, the action is not brought by the Attorney General, but is brought by the same officer as in the former case in the Court of Appeals, to-wit: the Prosecuting Attorney of Stark County, as a representative of the Board of Commissioners of Stark County, and at their direction.

In conclusion, therefore, upon this matter of *res judicata,* the former adjudication is not only a complete bar to the present action, since there is identity of causes of action and subject matter and of parties, and the former action was decided upon the merits, but also, since the former adjudication expressly decided in favor of this defendant the perpetuity and assignability of the franchise in question, the plaintiff is estopped to now re-open those questions.

CONCLUSION.

It must be conceded that the grant in question, though conferred by an authorized intermediate agency, to-wit, the County Commissioners, emanated from, and was held by the grantee directly under, the State of Ohio. It must also be conceded that the State of Ohio has never delegated to the County Commissioners any authority to revoke or forfeit the grant in question and that no such right was reserved by the County Commissioners in the grant itself, either expressly or impliedly. It must also be conceded that no statute limited the duration of the grant which the County Commissioners might confer.

The only question presented in this case, therefore, is a construction of the contract itself, in connection with the purposes and the nature of the improvement which it sought to authorize. Upon this question we submit that the permanent dedication of its property by the defendant as a common carrier, the permanent nature of the construction and improvements made under the franchise, the large investments made by the public upon the security of the franchise in question, and the general attitude of the Commissioners of Stark County and the public toward this franchise for more than twenty-one years, all indicate a permanency of the franchise in question entirely inconsistent with the revocability at will of this franchise, and wholly consistent with, and supporting the theory of the great weight of authority in this country, that such a grant is assignable and perpetual.

Respectfully submitted,

JOHN C. WELTY,
JOHN C. WEADOCK,
JOSEPH S. CLARK,
Solicitors for The Northern Ohio Traction & Light Company, Plaintiff in Error.

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In the Supreme Court of the United States

October Term, 1916.

No. [redacted]60

THE NORTHERN OHIO TRACTION & LIGHT COMPANY
and
THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

THE STATE OF OHIO on the relation of Robert C. Fawcett, Prosecuting Attorney of Stark County, Ohio,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

JOHN C. WELTY,
JOHN J. WADDOCK,
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The Cleveland Trust Company.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY
and
THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

THE STATE OF OHIO on the relation of Hubert C. Pontius,
Prosecuting Attorney of Stark County, Ohio,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF OHIO.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF FACTS.

The relator's brief at page 6, in commenting on the statement of facts of the brief in chief of The Northern Ohio Traction & Light Company refers to the report of this case in the Ohio Supreme Court (93 Ohio State, page 466) with the possible innuendo that the statement of that Court's decree contained in The Northern Ohio Traction & Light Company's brief was incorrect. The latter statement, however, is an almost verbatim copy of the decree itself which appears at page 17 of the record, whereas the relator's quotation is merely from the published report of the case.

At page 8 the relator's brief states that the bonds and mortgages issued by The Northern Ohio Traction & Light Company and its predecessors in title cover not only the right of way in question but other lines. As shown by the record, however, the mortgage of The Cleveland Trust Company, trustee, under which eight hundred and fifty thousand dollars of bonds are still outstanding, is secured solely by the franchise in question, such mortgage being executed on May 1, 1900, by The Canton-Massillon Electric Railway Company, whose only franchise at that time was the one in question.

The other comments of the relator's brief upon the statement of facts are propositions of law discussed in the later portions of this brief.

ARGUMENT.

I. THE JURISDICTION OF THE UNITED STATES SUPREME COURT.

The relator's brief contends that this Court has no jurisdiction because, the relator claims, the Supreme Court of Ohio did nothing but construe the grant in question. At page 19 the relator's brief says: "The question was not whether or not a grant existed but what the grant meant," and at page 21: "The existence or non-existence of the grant is not the subject of controversy." This is mere word trickery. It is true that before the filing of the relator's brief there never was any issue raised in this case as to whether a grant existed prior to the forfeiture resolution of the county commissioners, although the relator in the later pages of his

brief in this Court now questions the existence of such grant. Whether, however, there is an existing grant now has been and is the vital issue of this case. If the resolution of 1892 conferred a mere license terminable at will, the grant or privilege does not now exist. But if the grant was a contract, the natural term of which has not expired, it still exists. Consequently the question of the present existence of the contract, the vital issue of this case, turns upon the construction of the grant—the determination of "what the grant meant." The decision of the Ohio Court, therefore, construing the grant was nothing but a determination of the question whether the grant had been terminated by the action of the county commissioners.

If this does not present a federal question, then the jurisdiction of the Supreme Court of the United States to review state decisions is a nullity. Under the relator's argument, all a state court must do in order to make its decision final is to find that no contract or property right existed, and in such event, according to the relator's argument, no matter how erroneous such decision might be, the Federal Court could not consider the validity of the legislative act which destroyed that contract or property right. Such reasoning has been rejected by the United States Supreme Court time and again, definite decisions on this point being set forth in the brief in chief of The Northern Ohio Traction & Light Company.

The relator's brief, however, quotes certain decisions which it is claimed support the relator's argument. These cases, however, are readily distinguishable from the case at bar and do not support the claim for which they are cited. They are all cases in which the construction of a contract was the only question presented to the state

court, there having been no subsequent act of any public body attempting to impair it. We will consider the relator's authorities in the order in which they are set forth in his brief.

Turner vs. Wilkes County Commissioners, 173 U. S., 463.

This was an action begun in the courts of North Carolina to test the validity of certain bonds issued by county commissioners of that state. The Supreme Court of North Carolina held the bonds invalid on the ground that the county commissioners had been given no valid authority to issue the bonds in question. The only act claimed to be an impairment of contract rights was the decision of the court sought to be reviewed, the only question presented to the state court having been whether the bonds *when originally issued* were valid. No subsequent act was complained of in the state court, and consequently no federal question of impairment of contract was raised in the state court. The latter, therefore, passed upon no federal question and, therefore, there was nothing for the United States Supreme Court to review.

France vs. Missouri, 154 U. S., 667.

This was an action in quo warranto begun in the courts of the State of Missouri to exclude the plaintiffs in error from further use of a lottery franchise upon the ground that the latter by its terms had expired. As stated in the opinion of the United States Supreme Court in this case:

> "No claim was made under any statutes of the state passed for the suppression of lotteries, and the single question put to the Supreme Court of the state for determination was, whether the event had in fact happened which all agreed was to terminate the franchise. The court decided that it had and gave

judgment accordingly. No effect whatever was given to any law of the state impairing the obligations of the grant. Nothing was done but to decide that upon the evidence the grant had expired *by its own limitation.* * * * No federal question was raised or decided."

New Orleans Waterworks Company vs. Louisiana Sugar Refining Company, 125 U. S., 18.

This is another case where the issue before the state court and the decision of the state court rested solely upon the construction of statutes conferring the grant in question. No subsequent action of the state or its subordinate parts was involved or considered. The sole question raised and decided was whether the original grant itself gave the waterworks company certain privileges which it was claiming. The case was no different from any controversy between private individuals based solely upon contract rights. No impairment of such rights by the state or its representatives was involved. The distinction is well stated in the conclusion of the opinion at page 38 as follows:

"When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the state court up-holds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and, if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, it may on that ground affirm the judg-

> ment. So, when the state court up-holds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld."

The other decisions cited but not quoted in the relator's brief are of the same character as the ones considered above and are similarly distinguishable.

In the present case the Supreme Court of Ohio did more than construe the grant in question. It sustained the validity of the resolution of the county commissioners declaring the grant terminated. It did not hold that a grant had never existed or had expired by the lapse of time. It held, and the relator still contends, that the grant was terminable at the will of either party, and therefore was *terminated* by the resolution of the county commissioners. The Supreme Court of Ohio under its construction of the grant was obliged to consider and sustain the subsequent legislation of the county commissioners in order to hold that the grant had been terminated and no longer existed.

This brings the present case wholly within the language of the case last considered above, *New Orleans Waterworks Company vs. Louisiana Sugar Refining Company,* 125 U. S., 18, to-wit, (Opinion, page 38):

> "When the state court up-holds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be up-held."

This, therefore, leaves for discussion under the heading of jurisdiction only the contention of the relator that the subseqeunt legislation of the county commissioners was not such an act of impairment of contract as to come

within the constitutional prohibition. Evidently the relator's claim is that the resolution of the county commissioners declaring the grant terminated was only the act of "executive or administrative boards or officers."

It must be conceded, however, that county commissioners and municipalities in Ohio are political subdivisions of the state and that certain legislative authority has been delegated to them by the state. The county commissioners in Ohio have general legislative jurisdiction over streets and highways within their respective counties and outside of municipalities just as the city councils have jurisdiction over the streets within their respective municipalities.

It is true that the county commissioners have no authority delegated to them by the General Assembly to revoke or forfeit a grant conferred by them, but the attempt to exercise such authority was an attempted legislative act, and the decision of the Ohio Supreme Court in this case has given the force and effect of law to that attempted legislative act.

Further, it is to be borne in mind that the provision of the federal constitution prohibiting the taking of property without due process of law relates to acts of the state or its subordinate agencies, irrespective of the mode or manner of the action complained of. Under this constitutional prohibition it is immaterial whether the resolution of the county commissioners forfeiting the grant in question was a legislative or merely a ministerial act.

Iron Mountain Railroad Company vs. City of Memphis, 96 Fed., 113. This case was decided by the Circuit Court of Appeals, for the Sixth Circuit, the decision being rendered by Judges Taft, Lurton and Clark. In this case the plaintiff was granted by the taxing district of

Shelby County, Tennessee, the right to occupy with tracks Kentucky avenue in the City of Memphis. Subsequently, the city council attempted by ordinance to forfeit the grant and the Court held that such action by the City Council was both the taking of property without due process of law and an impairment of the obligation of contract. At page 121, the opinion of the Court rendered by Judge Taft, says:

> "Among the prohibitions of the first section of the fourteenth amendment to the constitution of the United States is this: 'Nor shall any state deprive any person of life, liberty or property without due process of law.' The first question presented is whether action by the legislative council of the city of Memphis under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of this amendment. There can be little doubt upon this point. In *Ex parte Virginia*, 100 U. S. 339, Mr. Justice Strong, speaking for the supreme court, said:
>
> 'We have said the prohibitions of the fourteenth amendment are addressed to the states. * * * They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state givernment, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must

be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it'."

The Court then cites numerous authorities in support of the foregoing proposition, and concludes on this point at page 125:

"With respect to the occupancy of a street, however, which it controls by virtue of its being an agent of the state, and a trustee for the public, its (the city council's) action in depriving persons having vested property rights in the street will, if without due process of law, be state action, within the inhibition of the fourteenth amendment. For our present purpose, it is not important whether this threatened taking possession of a street under a resolution by force is to be regarded as legislative or executive action, for either, as we have seen, is within the inhibition of the clause of the first section of the fourteenth amendment, which forbids a state to deprive a person of his property without due process of law."

The opinion then proceeded to consider the question of whether there had been an impairment of the obligation of contract, and after considering the authorities at length concluded therefrom at page 127, as follows:

"An examination of these cases makes it entirely clear that a declaration of a forfeiture of a public grant for condition broken is legislative in its character. It is not conclusive, of course, of the facts asserted, and may be judicially resisted (see Railroad Co. vs. Mingus, 165 U. S. 413, 434, 17 Sup. Ct. 348); but, if the condition in fact has been broken, it operates to divest the title and the right of possession. The resolution in question was a declaration enacted in form of law by the legislative council, a state agency, vested with legislative authority over the streets, by which, if valid, the title of the city and state and public in the streets granted to the complainant was divested from it, and revested

in the grantors. Clearly, the resolution was and is a law of the state within the meaning of the constitution."

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142.

At page 147, the Court say:

"Because the Supreme Court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the state court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose. *Houston & Texas Central Rd. vs. Texas,* 177 U. S. 66, 77, and cases cited. * * * We propose first to consider, even although it be conceded *arguendo* that the Supreme Court of the State of Minnesota erroneously decided that the contract relied upon did not impose the duty on the city to pay interest on the cost of construction of the unused gas lamps, whether there has been any state legislation impairing the obligation of such contract. Whilst it is not pretended that there is any law of the State of Minnesota by which the obligation of the contract was impaired, it is asserted that such consequence results from the ordinance adopted by the municipal council of the city of St. Paul, the text of which ordinance has been reproduced in the statement of the case.

"It is no longer open to question that 'a by-law or ordinance of a municipal corporation may be

such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States.' *New Orleans Waterworks Co. vs. Louisiana Sugar Refining Company,* 125 U. S. 18, 31; *Hamilton Gas Light & Coke Company vs. Hamilton City,* 146 U. S. 258; *Walla Walla vs. Walla Walla Water Company,* 172 U. S. 1."

In this connection we call attention to the authority cited in the relator's own brief, *New Orleans Waterworks Company vs. Louisiana Sugar Refining Company,* 125 U. S., 18, at pages 30 and 31 of the opinion, to-wit:

"As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the state as their fundamental law. In *Williams vs. Bruffy,* 96 U. S., 176, 183, it was said by Mr. Justice Field, delivering judgment, 'Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited relating to the jurisdiction of this court;' (Revised statutes, Section 709); and it was therefore held that a statute of the so-called Confederate states, if enforced by one of the states as its law, was within the prohibition of the constitution.

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States."

Southern Wisconsin Railway Co. vs. Madison, 240 U. S. 457.

This case came before the United States Supreme Court on error to the Supreme Court of Wisconsin. The suit was brought by the City of Madison to recover the cost of pavement between the rails of the defendant's track. The original franchise of the Railway required it to pave between its tracks, but in 1892, a new ordinance was passed, authorizing it to build and operate an electric line, which new ordinance eliminated the provision requiring pavement between the tracks, but made the grant "subject to such reasonable rules and regulations respecting such streets and highways and operation of cars, as the said city council may from time to time enact."

As stated in the opinion of Mr. Justice Holmes, at page 459:

> "The Supreme Court accepted the defendant's position, that its charter was a contract, but met the argument based upon it by a construction that warranted the later ordinance, and judgment for the **plaintiff was affirmed.** 156 Wisconsin, 352.
>
> "As our opinion is that the judgment should be affirmed, we shall not dwell upon a motion to dismiss made by the defendant in error. The court expressly upheld the later ordinance, and whether that ordinance can be upheld without impairing the obligation of the admitted contract of the charter is a federal question none the less that the answer depends upon the construction of the instrument. Even if the opinion below be read as asserting that the duty existed by the charter alone irrespective of the later ordinance, still as the ordinance, was set up and relied upon in the declaration and was present impelling, so far as might be, the decision reached and was given effect by that decision, we should not dis-

miss the case. *Terre Haute etc. R. R. vs. Indiana,* 194 U. S. 579."

In accord:

Atlantic Coastline Railroad Company vs. Goldsboro, 232 U. S. 548, at page 555;
Reinman vs. Little Rock, 237 U. S. 171, at 176.
Terre Haute etc., R. R. vs. Indiana, 194 U. S., 579.

Every case cited in the briefs in chief of plaintiffs in error upon the main issue of this case was one in which a grant containing no limitation as to duration had been declared terminated by the municipality or subordinate political subdivision of the state which conferred the original grant. Some of those cases came from the lower federal courts, some from the state courts, and in each case the issue was the same as here, whether the grant was a mere license terminable at will or a perpetual contract, and in each case the Supreme Court of the United States construed the grant as a perpetual contract and held invalid the subsequent ordinance or resolution of the political subdivision of the state *on the ground that it was an impairment of contract rights within the constitutional prohibition.*

If the grant in question is a perpetual contract, there can be no doubt under the authorities cited in the briefs of both parties herein that the resolution of the county commissioners declaring the same terminated and no longer existing was an impairment of contract rights such as is prohibited by the federal constitution. The construction of the grant itself, therefore, is thus a federal question which, under all the authorities, the Supreme Court in such error proceedings will decide for itself.

II. THE QUESTION OF PERPETUITY OF THE GRANT.

(a) Statutory Authority of the General Assembly.

The relator's brief at page 23 calls attention to two provisions of the Ohio constitution adopted, it is said, to supersede the ruling of the Dartmouth college case. The most that can be urged for these provisions, however, is that they reserve the right of repeal or revocation in certain instances in the *General Assembly*. It is unnecessary to consider whether the grant in question comes within these provisions of the state constitution since the general assembly has *not* revoked or repealed the grant in question and has never authorized the county commissioners to revoke or repeal any such grant. This is clearly pointed out in the dissenting opinion of the Ohio Supreme Court at page 20 of the record a part of which is quoted in the brief in chief of The Northern Ohio Traction & Light Company at page 24.

(b) Statutory Authority of the County Commissioners to Make Perpetual Grants.

It seems to be the contention of the relator's brief at pages 23 to 30 that in 1892, when the grant in question was conferred, there was no statutory authority for the occupation by a street railway of a highway outside of a municipality unless such railway was an *extension* of a railway within a municipality or unincorporated village. Such a claim has never been made before in this case and certainly is an ingenious one in view of the plain language of the statutes and the decisions of the Ohio courts.

In support of this argument relator's brief at page 23 first quotes Section 3437 of the revised statutes of

Ohio as in force in 1892. The title of this statute, which is not quoted in relator's brief, is "*Where* Street Railways May be Constructed," and the statute provides:

> "Street railways, with single or double tracks, sidetracks and turnouts, may be *constructed* or extended within or *without* or partly within and partly without any municipal corporation or unincorporated village."

What clearer language could be used to expressly authorize the construction of a street railway wholly outside of a municipality or unincorporated village? In view of this statute it is idle to contend as is done at pages 25, 26 and 27 of relator's brief that interurban railways were not authorized by statute until 1894 when certain quoted additions to the private *corporation* laws were enacted.

The next statute quoted in relator's brief is Section 3438 of the Revised Statutes. Discussion of this statute, however, is needless because, if it does not give the authority in question, the county commissioners had such authority in 1892 under and by virtue of Section 3441 Revised Statutes, which, as it stood in 1892, provided as follows:

> "Section 3441. (The authority controlling the public road must consent). If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other *public officer*, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied. (67 V., 10, Section 1)."

The relator's brief admits that the control of the right of way in question was in the county commissioners in 1892, and the last quoted statute, therefore, clearly

gives them the authority in question. Such was the express holding in the following case:

The Citizens Electric Railroad vs. County Commissioners, 56 Ohio State, page 1.

In this case the City of Mansfield passed an ordinance undertaking to grant the Railway Company the right to extend its track along a county highway beyond the limits of the municipality. The extension was constructed without any permission having been obtained from the county commissioners. This was a suit brought by the commissioners for damages by reason of such construction of the railroad upon the county highway. The trial court directed a verdict in favor of the Railway Company, and judgment was rendered, dismissing the action. This judgment was reversed by the Circuit Court and also by the Supreme Court of Ohio, which latter Court in its opinion at page 6, said:

> "The leave to extend, obtained by ordinance from the city council, did not, as we think, of itself confer the right on the Company to occupy the Olivesburg road; it was under the supervision and control of the commissioners of the county and by Section 3441 Revised Statutes, the Company was required to agree with the commissioners as to its occupation. * * * *This section* (Section 3441) *plainly applies to state and county roads under the control of county commissioners,* as well as to roads under the control of the Board of Public Works. No reason is perceived why any discrimination should have been made; and the term 'officer' will, in its connection, by fair interpretation include a board of county commissioners."

The Supreme Court of Ohio, therefore, has left nothing to argue about concerning the authority of the county commissioners, it having expressly held that the coun-

ty commissioners had such authority under Revised Statutes, Section 3441.

In fact, under the decisions of the Ohio courts, no express statutory authority was necessary, since the county commissioners had sufficient authority under their general powers of control over county highways. Such was the holding in the case of:

> *Hattersly vs. Village of Waterville,* 4 O. C. C. Rep. (N. S.) 242; affirmed by the Ohio Supreme Court in 74 O. S. 466.

This case related to the authority of municipalities. The same principle applies exactly to the authority of county commissioners. This was a suit on a check deposited with a bid by an interurban railway company for a franchise to operate a street railway upon the streets of the Village of Waterville. After the bid was accepted and the franchise awarded to the interurban railway company, the latter failed and refused to construct the railway. The defense to the suit upon the note was that the franchise was void, because the statutes (Revised Statutes, Sections 2501, 2502, 3437, 3438 and 3439), authorizing municipalities to grant street railway franchises, were unconstitutional. The judgment of the trial court, in favor of the plaintiff, was affirmed by the Circuit Court, the Court in its opinion saying at page 245:

> "But we shall not now determine whether these street railroad statutes are unconstitutional or not. In our judgment it is one of the powers of a municipal corporation, regardless of these statutes, to permit and regulate the construction and operation of street railroads through its streets. A street railway, as has been said many times, is only another mode of conveyance; it is a convenience for the public, like an omnibus line or hack line or automobile line, or many other means of conveyance that are

used. One of the powers of a municipal corporation, and the power conferred upon it by the general laws, is, we think, to regulate matters of that kind in its streets. It is one of the general powers of a municipal corporation, and without these statutes, municipalities would have the power to permit a company to construct, maintain and operate a street railroad upon such reasonable conditions and terms as the municipality might fix."

Another claim made for the first time in this case by the relator's brief filed in this court, is that the grant in question was beyond the authority of the county commissioners and, therefore, invalid because it was an *exclusive* grant. No one has ever made this claim before, and it is not sustained by the facts.

An examination of the resolution conferring the grant in question, (Record, page 64), disposes of the relator's claim. The resolution starts out by stating that the right is given to locate a railroad along *"either"* side of the highway. The relator's argument is based on the assumption that the word "either" means both sides. The plain meaning of the word "either," however, and the definition of the dictionaries, is "one or the other."

Furthermore, this meaning is made clear, and the interpretation of the relator is rebutted by the following provisions of the grant, which provides that in certain instances "instead of locating said railroad on *one* side of the center line, as above provided, the same may be located along the center line of the road." Later, the resolution, conferring the grant, provides, "in case the railroad is built upon the *side* of the road." A reading of the entire resolution, therefore, makes it clear that the track was authorized to be laid only on *one* side, or, in certain instances, in the center of the road.

As pointed out in the brief in chief of The Cleveland Trust Company herein, the interpretation put upon a contract by the parties is material, and the acts of the parties, including the construction of the single track upon only one side of the highway, rebuts the claim of the relator. In the only place where a double track was constructed, to-wit, at Reedurban, the county commissioners, on May 3rd, 1909, adopted a special resolution providing that, in view of the widening of the highway at Reedurban, The Northern Ohio Traction & Light Company was thereby granted the right and privilege of placing *two tracks* in said highway along the center of the road. (Record, page 65.)

The relator's own argument, the entire language of the grant itself, and the interpretation thereof by the parties, all show that the grant in question was not exclusive. We submit that the statutes and the decisions of the Ohio courts clearly establish the authority of the county commissioners in 1892 to confer the grant in question.

(c) Language of the Grant Itself as Bearing Upon the Question of Perpetuity.

The relator's brief at page 31, emphasizes the fact that the grant is silent as to the time of duration. It is that very silence as to the time of duration, however, that, under the decisions of the United States Supreme Court, makes the grant perpetual.

Under this heading the relator also calls attention to the lack of such words in the grant as "successors," "assigns" and "forever." Under the decisions of the Ohio Supreme Court, however, as well as the general

weight of authority, there is no significance in the absence of such words. The question of whether such words are necessary is essentially a question of real property, and the Supreme Court of Ohio, in the case of *Junction Railroad Company vs. Ruggles,* 7 O. S., page 1, (Northern Ohio Traction & Light Company's brief in chief at page 30), expressly held that the words "successors" or "assigns" were not necessary in order to create a perpetual easement. The fact that the case of *Junction Railroad Company vs. Ruggles* concerned a railroad right-of-way over *private* property is immaterial, since the question of the necessity of such words as "successors" or "assigns" is essentially a real property question, and since, as stated by Judge Lurton, in the case of *Louisville Trust Company vs. Cincinnati,* 76 Federal 296, a grant of rights in a street "is a grant of a typical easement in property."

Furthermore, if words of succession be of any significance, it is to be noted that the Reedurban grant from the County Commissioners, (Record page 65) which was also forfeited by the Commissioners, recites that the original grant of 1892 was to "William A. Lynch, his *heirs* and *assigns,*" and amends the original grant by conferring additional rights without limitation of duration in favor of "The Northern Ohio Traction & Light Company, its successors and assigns."

(1) Rules of law governing construction.

Under this heading, at page 32, the relator's brief quotes several statements of the rule that public grants, in case of ambiguity, are to be construed most strongly in favor of the public. So general a rule, however, is of little assistance in construing a particular contract, and

the rule is not applicable in the present case. In the numerous decisions of the United States Supreme Court cited in the briefs in chief of the plaintiffs in error, holding similar grants to be perpetual, the rule was not applied, which is an all-sufficient answer to the relator's invocation of the rule. Contract rights are not to be frittered away by any such rules of construction. As stated in the case of *Citizens Bank vs. Parker,* 192 U. S. 73, at page 84:

> "The books abound in rules of construction. They all have but one end in view, and that is to ascertain and declare the intent of the act under construction."

In this same case the court further stated, in reference to the rule of construction invoked by the relator:

> "It is not a substitute for all other rules; it does not mean that whenever a controversy is, or can be raised, of the meaning of the statute, ambiguity occurs, which immediately and invariably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute."

The Supreme Court of the United States has repeatedly held that a grant such as the one in question does not require the application of the rule in question.

> *Owensboro vs. Cumberland Telephone Co.,* 230 U. S. 58.

Old Colony Trust Company vs. City of Omaha, 230 U. S. 100.

Boise Artesian Hot & Cold Water Co., Ltd., vs. Boise City, 230 U. S. 84.

Grand Trunk Western Railway Co. vs. City of South Bend, 227 U. S. 544, etc.

(2) Ohio decisions.

At Page 33, under this heading, the relator's brief commences as follows:

> "Cases holding grants, silent as to time, to be perpetual, can, of course, be cited. Holdings in the various states are at variance."

The relator, however, cannot, and has not, cited a single decision of any court, except the decision in the case at bar, holding such a grant as the one in question to be terminable at will. The only cases cited by the relator on this question are the following:

The East Ohio Gas Co. vs. City of Akron, 81 O. S. 33.

This case was considered at length at Pages 39, 40, 41 and 42 of the brief in chief of The Northern Ohio Traction & Light Company. It is not discussed at all in the relator's brief, and no consideration of our rebuttal argument thereto is made in the relator's brief. For a consideration of this case, therefore, we merely refer to the above cited pages of The Northern Ohio Traction & Light Company's brief in chief.

Rodefer vs. Railroad Company, 72 O. S. 272.

This case involved merely the construction of a sidetrack agreement made by the former owner of certain real estate with the railroad company, for the benefit of the property owner in making his factory accessible to railroad facilities. The subsequent owner of the property undertook to remove the sidetrack, and the railroad

commenced action to enjoin him from such removal. The trial court gave judgment for the defendant, and this was affirmed by the Supreme Court, which held that the sidetrack agreement was a mere license and that the license, although executed, was revocable by the property owner. The Supreme Court examined the sidetrack agreement and decided that it did not create an easement, for the reason stated in the opinion at Page 286, as follows:

> "The agreement does not purport to grant any interest in the land. An interest in the land was not necessary to the accomplishment of the object of the agreement and there is nothing in the agreement, or in the circumstances surrounding the parties at the time they entered into it, from which may be inferred an intention to grant such an interest. The railroad company did not pay for the privilege of putting in a siding for its benefit. It *received* pay for constructing the siding on the owner's land and for the owner's sole benefit. No right to use it otherwise is provided for in the agreement, nor is it provided that the owner shall ship on plaintiff's road. The contract is with Rodefer Bros., the defendant is not privy to it and not bound by it, and if he does not choose to use the siding for shipping or receiving freight, what possible benefit could the plaintiff derive from maintaining it? The sole object of the agreement, so far as relates to the siding, was to secure an accommodation from the railway company for the owner of the land, not to grant to the railway company a privilege in the owner's land. The siding being on the land of the defendant and solely for his benefit, he may terminate the right to maintain it and may require its removal."

In the case at bar we have a grant for the main track of the railway. A grant for a sidetrack, such as the one involved in the case of *Rodefer vs. Railroad Company, supra,* presents an entirely different question, as stated by this Court in the case of

Seaboard Air Line Railway vs. City of Raleigh, 242 U. S. 15.

This case involved the construction of a city ordinance permitting, without limitation as to time, the extension of a *sidetrack* to a private factory. The court held, as in the case of *Rodefer vs. Railroad Company, supra,* that the city ordinance conferred a mere license. Chief Justice White, in the opinion at Page 19, distinguished the case from the cases holding perpetual a grant for a main line specifying no time of duration, as follows:

> "But while the general rule is well founded and the exception or limitation by which it is asserted to be qualified is well settled, it has no relation to the case in hand, since the particular action of the city in question concerned a mere permission to exercise a facility as a license given long after the creation of the railway corporation and not inherently or in any degree necessarily controlling its power to discharge its corporate attributes. Indeed so much is this the case on the face of the situation here presented that it becomes apparent that to apply the limitation to a case like this would destroy the general rule itself."

Ampt vs. City of Cincinnati, 6 Nisi Prius, 401.

This was a taxpayer's suit to enjoin the defendant from using the streets of Cincinnati for the maintenance and operation of *pneumatic tubes.* The court simply held that the action of the Council, in conferring the authority upon the defendant to use the streets for this purpose, was *ultra vires.* The statutes of Ohio do not authorize the use of the streets for pneumatic tubes, and pneumatic tubes can hardly be said to be a method of travel enlarging the primary functions of the streets so that a grant for such use might come within the general implied powers of the municipality. The court having held that

the grant was *ultra vires,* it necessarily followed that such a grant in perpetuity was *ultra vires.* It is further to be considered that this decision was by one of the lower courts of the state.

MUTUALITY.

At Page 35, the relator's brief contends that if the grant in question is perpetual, there is a want of mutuality, since certain quoted sections of the General Code of Ohio authorize the changing of the route of street railway companies. It is to be borne in mind, however, that the statutes quoted only authorize the street railway company to appropriate private property

> "in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or to extend or shorten its railway line or to provide land on which to extend its power plant."

There is nothing in the record to show that any such conditions precedent exist. Furthermore, even if they did exist, it must be remembered that any change of route would necessitate the crossing of county highways by railway company, and that this could not be done, and consequently, the route could not be changed without the consent of the county commissioners. Finally, it is to be noted that the statutes quoted by the relator in this connection were enacted April 7th, 1904 (97 Ohio Laws, Page 106), so that they are of no relevancy in construing the grant in question. The matter of mutuality of obligations of the contract must be determined as of the date of the contract. This also disposes of the next heading of relator's brief at Page 36, to the effect that the use of the highway in question is not necessary for the discharge of the railway company's corporate functions.

THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF STARK COUNTY, OHIO, OF FEBRUARY 19th, 1913.

The contention of the relator under this heading, at Page 37, is that the above mentioned resolution (Record, Pages 26 to 29), was not the taking away of any property or contract rights, since the grant was terminable at will, and the resolution in question, therefore, merely expressed the election of the county commissioners to terminate the license. Of course, this is true if the premise upon which it is based is accepted, but the argument assumes, as a premise, the relator's view on the very question in issue in this case, to-wit, whether or not the grant was perpetual.

ESTOPPEL.

Under this heading, the relator seems to contend that there can be no estoppel in regard to a public grant. This contention is rebutted by numerous decisions of the United States Supreme Court cited in the briefs in chief of plaintiffs in error, which the relator's brief calmly ignores.

Furthermore, the action of the parties to the contract and the general public are material, not merely as bearing upon the question of estoppel, but also as showing the interpretation placed upon the grant by the parties themselves.

RES JUDICATA.

The contentions of the relator under this heading, at Page 39 of his brief, are so fully covered in the brief in chief of The Northern Ohio Traction & Light Company, at Pages 46 to 59, that we will not consider the subject further in this brief, but merely refer to the brief in chief.

CONTENTION OF RELATOR THAT THIS GRANT IS NOT PERPETUAL BECAUSE THE GRANT COULD NOT HAVE BEEN MADE FOR MORE THAN TWENTY-FIVE YEARS.

At Page 40 of the relator's brief, another argument is made which has never been presented in this case before, and was not considered by the Supreme Court of Ohio; to-wit, that Section 2502 of the Revised Statutes, limiting to a term of twenty-five years any street railway grants by *municipalities*, applies also to grants by county commissioners.

The forfeiture resolution of the county commissioners is not based upon the expiration of twenty-five years, as that period had not expired at the time the resolution was passed, nor had such period expired at the time this suit was instituted. Whether, therefore, Section 2502 does or does not apply to county commissioners, as to limitation of time, is not involved in this case, and that question is not before the Court herein.

Section 2502, in the form in force in 1892, provided as follows:

> "Section 2502. (Proceedings to establish a street railroad route; grant not valid for more than twenty-five years.)

Nothing mentioned in the next preceding section shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon the recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant. (1884, March 20; 81 vs. 66; 80 vs. 173; Rev. Stat., 1880; 67 vs. 77, Section 412; 76 vs. 156, Section 5; S. & C., 1560.)"

Although the above statute, by its express terms, is limited to councils of municipalities, the relator's brief

contends that it is made applicable by the provisions of Section 3439 as in force prior to its amendment on April 18th, 1883.

As it stood in 1892, Revised Statutes, Section 3439 provided as follows:

> "Section 3439. (Written consent of owners of more than one-half of feet front necessary.)
>
> No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of sections two thousand five hundred and one and two thousand five hundred and three to two thousand five hundred and five, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class. (1883, April 18; 80 vs. 173, 175; Rev. Stat., 1880; 65 vs. 112, Section 3; S. & S., 139.)"

It is to be noted that this statute, Section 3439, in 1892 made no reference whatsoever to the above mentioned statute Section 2502 placing a twenty-five year limit on *municipal* grants. Prior to April 18th, 1883, however, Section 3439 included in its cross reference to municipal statutes Section 2502, and the contention of the relator is that Section 3439, in the form in which it stood prior to April 18th, 1883, was still in force in 1890, because the amendment thereto on April 18th, 1883, striking out the cross reference to Revised Statutes, Section 2502, was unconstitutional.

In the first place, even if it were conceded, which it is not, that Section 3439 in 1892 contained a cross ref-

erence to Section 2502, the relator's conclusions therefrom would not follow. The cross reference in Section 3439 to the other statutes is, and prior to 1883 was, "and the provisions of Section 2501, etc., * * * *so far as they are applicable,* shall be observed in all respects."

An examination of Section 2502, Revised Statutes, quoted above, shows that it is *not applicable* to any grants except those by councils of municipalities. The clear language of both statutes, Sections 3439 and 2502, shows that never in the history of the Ohio statutes was there any such twenty-five year limitation upon the grants of county commissioners. The very case which the relator's brief cites in support of his claim of the unconstitutionality of the amendment of Section 3439 by the act of April 18th, 1883, expressly so stated. We refer to the case of

Railway Company vs. Railway Company, 5 O. C. C. (N. S.) 583, affirmed without report in 73 O. S. 364; cited at Page 41 of relator's brief.

At Pages 594 and 595, the Circuit Court say:

"It is very evident that Sections 2501 to 2505, Revised Statutes, inclusive, standing alone, relate to street railway lines located and extended wholly within municipalities, while Section 3437, Revised Statutes, *et seq.*, relate to all lines and extensions wherever located. In case of conflict as to *city* lines or extensions, the more general provisions of Section 3437, Revised Statutes, *et seq.*, must yield to the more specific provisions of Section 2501, Revised Statutes, *et seq.*"

"At the very most it can not be contended that Section 3439, Revised Statutes, requires the observance of Section 2502, Revised Statutes, *et seq., only when the same are applicable. They are not applicable* in all cases covered by Section 3439, Revised Statutes, *to-wit, a line constructed wholly without a*

municipality or an extension of such line not into or through a municipality. In such case municipal officers would have no duty in the premises and the sections only enjoin duties upon such officers."

In the second place, we do not concede that Section 3439, as it existed in 1892, contained any reference to Section 2502, but contend that, so far as the grant in question is concerned, the amendment to Section 3439 of April 18th, 1883, striking out all reference to Section 2502, was in full force and effect.

In the case of *Railway Company vs. Railway Company*, 5 O. C. C. (N. S.) 583, *supra*, the Circuit Court in its opinion stated that the amendment of April 18th, 1883, was unconstitutional, because of the concluding sentence, to-wit, "providing that this act shall not apply to any county containing a city of the second grade of the second class." The Supreme Court, in affirming this decision, rendered no opinion, so that it is impossible to state on what ground its decision was based. The Circuit Court having held that Sections 2502 *et seq.* were not applicable, was not called upon to decide the constitutional question. The constitutional question not necessarily being involved, it is impossible to say whether the Supreme Court of Ohio passed upon the constitutional question or not. Even assuming, however, that the Supreme Court, in affirming the decision without report, did pass upon the constitutional question, its decision cannot invalidate Section 3439 as amended April 18th, 1883, so far as the grant in question is concerned, for the reason that numerous previous decisions of the Supreme Court of Ohio, sustaining the constitutionality of similar statutes, became a part of the amendment of April 18th, 1883, and therefore, as to the rights already acquired, the later

decision of the Supreme Court reversing those decisions, could have no effect. Prior to 1896 there had been a long line of decisions by the Supreme Court of Ohio sustaining the constitutionality of statutes limiting the application of such statutes to cities or counties of certain arbitrary classifications. It was not until April 28th, 1896, when the case of *Hixson vs. Burson*, 54 O. S. 470, was decided, that the Supreme Court of Ohio reversed its former rulings upon that point. Since the reversal of its former rulings, however, the Supreme Court of Ohio has recognized and enforced a well-settled doctrine, and held that contracts made under the authority of such special legislation prior to the time of such reversal on April 28th, 1896, will be upheld in spite of the fact that subsequent to such date legislation of such special character has been held unconstitutional.

State of Ohio ex rel. Herman vs. The Oakwood Street Railway Company, 11 C. C. (N. S.) 263; affirmed by the Supreme Court of Ohio in 81 O. S. 502.

This was a proceeding in *quo warranto* to oust the defendant from the use of its street railway franchise in the City of Dayton, which had been granted July 10th, 1891, for fifty years, under Section 2502 as amended April 24th, 1891. This amendment authorized street railway grants for a period of fifty years instead of twenty-five years in cities of the second grade of the second class, which classification included no other city in the State of Ohio except the City of Dayton. The contention of the relator was that the amendment under which the grant in question was conferred, was unconstitutional as special legislation, and that, therefore, the franchise was invalid.

The court held, however, that as the amendment under the decisions of the Supreme Court then in force was constitutional at the time the grant in question was made, the subsequent decisions on special legislation reversing former holdings could not invalidate the grant.

At Page 269, the Circuit Court say:

"Whether the section under consideration is repugnant to the Constitution under the 66th Ohio State cases is not the question that must determine the controversy here. A change in judicial opinions respecting the constitutional validity of legislative enactments can not have retroactive operation upon contracts entered into pursuant to statutory provisions and in reliance upon former adjudications respecting their validity. To give them such operation would violate another provision of the Constitution equal in importance to the one urged here.

> 'The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to legislative amendment; that is to say, making it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as on amendments of the law by means of a legislative enactment. *Lewis vs. Auditor Sims*, 61 O. S. 471; *Douglass vs. County of Pike*, 101 U. S. 677.'

"So that if, in view of adjudications since the amendment to Section 2502, April, 1891, the section is probably unconstitutional, yet as similar laws, including the same or similar constitutional defects, had been judicially determined valid theretofore and at the time of the grant to the railway company, the subsequent adjudications could not have a retro-

active effect upon the grant, because it is a contract founded upon a good consideration. *Shoemaker vs. City of Cincinnati,* 68 O. S. 603."

Shoemaker vs. City of Cincinnati et al., 68 O. S. 603.

Syllabus I:

"An owner of land which has been assessed for the improvement of a street is not entitled to an injunction restraining the collection of such assessment where a statute in all material respects the same as the one under which the improvement was made and the assessment levied, and the bonds of the municipality to pay the cost issued, had theretofore been adjudged valid by the highest court of the state, simply because similar legislation was held by the same court long afterwards to be in violation of the constitution."

At Page 613, the Court say:

"The underlying principle presented is not dissimilar from that involved in the *City of Cincinnati vs. Taft,* 63 Ohio St. 141. There was present in that case a question as to the constitutionality of an act supplementary to that which authorized the issue of bonds for the construction of the Cincinnati Southern Railway. This act, if it were new legislation, would be now condemned as unconstitutional; but it having been sustained by the decision in *Walker vs. Cincinnati,* 21 Ohio St., 14, the court held in the *Taft case,* without regard to the constitutional question, that: 'An act of the general assembly to authorize a municipality to issue bonds for the construction of a public improvement having been adjudged by this Court to be constitutionally valid, and the bonds having been thereafter sold and the improvement made, the court will follow the former decision as to the validity of supplementary acts relating to the renewal or extension of such bonds.' It would appear that this branch of the present case might be disposed of on the authority of that case."

Goodale vs. Fennell, 27 O. S. 426.

At Page 432, the Court say:

"One of the tests that a contract has been impaired is that its value by legislation has been diminished.

It is not a question of degree, but of encroaching in any respect on its obligation—dispensing with any part of its force. *Planters Bank vs. Sharp,* 6 Howard, 327; *Green vs. Biddle,* 8 Wheat. 84."

In this case it was held that a suit limiting the authority of a municipality in regard to street improvement assessments, and repealing a former statute giving wider powers, could not operate to affect an executory contract for improvements made prior to the amending and repealing statute, and that, therefore, an assessment made under the old act subsequent to the enactment of the repealing statute, was valid.

The Board of Commissioners of Franklin County vs. Gardiner Savings Institute, 119 Fed. 36.

In this case in the Circuit Court of Appeals for the Sixth Circuit, composed of Judges Lurton, Day and Severens, it was decided that bonds issued under an Ohio statute relating only to counties containing cities of the first grade of the second class, which included only Franklin County, being issued prior to the decision in *Hixson vs. Burson,* were valid, although the legislation in question was clearly unconstitutional under the subsequent decision in *Hixson vs. Burson.*

The Court by Judge, now Mr. Justice Day, said:

"It is claimed that the act under which the bonds were issued is unconstitutional, as being in contravention of Article XXVI (Article II, Section 26) of the Constitution of Ohio, which provides that all laws of a general nature shall have a uniform operation throughout the state. Since the decision in *Hixson*

vs. Burson, 54 Ohio St. 470; 43 N. E. 1000, there can be no question as to this law falling within the category of those condemned as attempts to enact special legislation, when general laws having a uniform operation throughout the state can only be passed. *Hixson vs. Burson* expressly overruled the prior decision of the Ohio Supreme Court in *State vs. Board of Franklin Co. Com'rs,* 35 Ohio St. 459, holding legislation of the character of that now under consideration to be valid. The latter decision was the declared law of the state when these bonds were issued. As late as *Wilkes Co. vs. Coler,* 180 U. S. 506, 21 Sup. Ct., 458, 45 L. Ed., 642, Mr. Justice Harlan, speaking for the Supreme Court, said:

> 'It is a settled doctrine in this court that the question arising in a suit in a federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when securities were issued, and that the rights and obligations of parties accruing under such a state of law would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation. *Loeb vs. Trustees,* 179 U. S. 472, 21 Sup. Ct., 174, 45 L. Ed., 280, and authorities there cited.'

"Up to the time of the issue of these bonds, acts similar to the one under consideration had been upheld by the Supreme Court of Ohio. The fact that the plaintiffs below purchased the bonds after the decision in *Hixson vs. Burson* can not affect its title as a *bona fide* holder if the bonds were issued under a law held to be valid at the time of the issue. *Gunnison Co. vs. E. H. Rollins & Sons,* 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689."

Douglass vs. County of Pike, 101 U. S. 677.

This case involved the validity of bonds issued to pay for the defendant county's subscription to the capital stock of a railroad company. Prior to the issue of

the bonds in question, the Supreme Court of the State of Missouri, in which state the bonds were issued, had held such bonds to be valid, but subsequent to such issue the Supreme Court of Missouri had reversed its former decisions, holding that the act under which the bonds were issued was unconstitutional. The United States Supreme Court held that the bonds in question were valid, the Court, at Page 687 of its opinion, saying:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

The decision of the Circuit Court in *Railway Company vs. Railway Company,* 5 O. C. C. (N. S.) 583, relied upon by the relator as holding that the amendment of 1883 to Section 3439 was unconstitutional, as special legislation, relates to grants made in 1901 and 1902, subsequent to the decision of the Supreme Court in *Hixson vs. Burson* in 1896, and, therefore, is not in conflict with the doctrine of the above cases.

In conclusion on this matter, we call the Court's attention to the fact that under the decision of the Supreme Court of Ohio in *Citizens' Electric Railroad Company vs. County Commissioners,* 56 O. S. 1, the county commissioners received their authority to make the grant in question, under Section 3441, so that Section 3439 would not apply to the grant in question even if the

relator's argument as to what was the form of said section in 1892 were conceded. The relator's own argument, at Pages 23 to 30 inclusive of his brief, follows this same line of reasoning, and contends that Sections 3437, 3438 and 3439 did not apply to the grant in question.

The relator's brief makes no reference to Revised Statutes, Section 3438, in reference to Section 2502. Prior to April 18, 1883, Section 3438 contained no reference to Section 2502, but under that amendment it did refer to said section. Evidently, the relator's theory being that the amendment of 1883 was unconstitutional, he does not consider that Section 3438 as in force in 1892, contained any reference to Section 2502. Lest the relator, however, should raise the question at some subsequent time we call the Court's attention to the concluding language of Section 3438, as amended April 18th, 1883, and as it stood in 1892, to-wit:

> Section 3438:
>
> "* * *; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been built or shall be built in pursuance of a right obtained from any source or authority *other* than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of Sections 2501 and 2502."

The above section clearly limits the operation of Section 2502 to street railways within the limits of a municipality, and expressly negatives any application thereof to grants by county commissioners.

To sum up this matter, Section 2502 is not applicable since twenty-five years had not expired at the time this suit was commenced; Section 3439 did not apply to the grant in question, since the grant was made under au-

thority of Section 3441; Section 3339, even as it stood prior to 1883 with a cross reference to Section 2502, limited its cross reference to Section 2502 to cases only "so far as applicable," and Section 2502, by its express terms, has never been applicable to the grant in question, since it was enacted as part of the municipal code and by its express terms applied only to city councils; Section 3439, as amended April 18th, 1883, and as it stood in 1892, contained no reference whatever to Section 2502, and, so far as the grant in question is concerned, was constitutional and in full force and effect under the decisions of the Supreme Court of Ohio and the Supreme Court of the United States; and since 1883 up to the present time, Section 3439 (now Sections 9105 and 9106 of the General Code of Ohio) has contained no reference whatever to any of the sections 2501 *et seq.* There has never been, and there is not now any statute in Ohio placing any limit upon the duration of grants by county commissioners over public highways under their jurisdiction. The legislative policy of the state has always left that matter entirely to the commissioners' discretion.

THE DECISION OF THE SUPREME COURT OF OHIO.

In reference to the decision of *The East Ohio Gas Co. vs. Akron,* 81 O. S. 33, it is not true, as stated under the above heading, at page 41 of the relator's brief, that we have overlooked the fact that the statutes of Ohio provide for two distinct things with reference to gas companies, namely, authority to municipalities to grant a gas company the right to occupy the streets, and authority to municipalities to make ten-year contracts with gas com-

panies as to the price of gas. At page 40 of the brief in chief of The Northern Ohio Traction & Light Company, attention was called to the provision in The East Ohio Gas Company's franchise to occupy the streets, reserving to the City of Akron the right to avoid the franchise and resume control of the streets.

In the present case no such right was reserved, nor was it delegated by the Legislature to the commissioners. At page 41 of The Northern Ohio Traction & Light Company's brief in chief, attention was called to the language of the Court that this provision of the grant of the right to occupy the streets gave a corresponding right in favor of the grantee, so that, if the grant to occupy the streets were to be considered by itself, it by its terms, was terminable at will by either party, else it was lacking in mutuality.

At pages 41 and 42 of The Northern Ohio Traction & Light Company's brief in chief, however, attention was called to the statutes authorizing municipalities in Ohio to contract with gas companies, fixing the *price* of gas for a period of only ten years. A contract having been made between the City and the Gas Company, fixing the price of gas for ten years, concurrently with the enactment of the grant to occupy the streets, the two ordinances supplemented each other, and the grant of the right to occupy the streets, silent as to duration and by its terms terminable at will, was, in effect, a grant for ten years. As stated at page 41 of The Northern Ohio Traction & Light Company's brief:

> "The statutes (2478 and 2479, authorizing the fixing of the price of gas for ten years) were necessarily a part of the original contract between the Gas Company and the City, under which the former placed its pipes in the city streets."

Also as stated at page 42 of The Northern Ohio Traction & Light Company's brief in chief:

> "What the Court really held, therefore, in the case of *The East Ohio Gas Company vs. The City of Akron,* was that the franchise in question was for the term of only ten years."

The Supreme Court of Ohio in the case of *The East Ohio Gas Company vs. The City of Akron,* expressly refused to pass upon the question of perpetuity.

SUMMARY.

We submit:

First: That the County Commissioners had full right and authority to confer the original grant and franchise involved in this action.

Second: That they had equal authority to grant the amended franchise in 1909—the Reedurban Grant—which subsequent grant is not only a recognition of the former grant, but an amendment thereto and ratification thereof for the like period of the original grant.

Third: That as there is no definite time of duration fixed in either grant, and no limitation thereof in the statutes of Ohio, the grants were, therefore, perpetual.

Fourth: That there is no claim made that the Traction Company has ever violated any condition or provision of either grant.

Fifth: That the County Commissioners neither reserved nor ever were delegated any authority to revoke or terminate the grant.

Sixth: That the surrounding circumstances, the nature of the improvement and the rights granted, and the

investment of large sums of money, all being of a permanent character, rebut the idea of the grant being "terminable at will" but are in harmony with our contention.

Seventh: That the claim of the relator that the grant is limited to twenty-five years is not in issue in this case, because that period of time had not elapsed at the time of the passage of the forfeiture resolution nor the commencement of this action, and this proceeding does not claim a right to forfeit the grant upon that issue.

Eighth: That the question of fare, not being fixed in the grant, is left to the control of the Public Utilities Commission of Ohio (Ohio General Code, Sections 487 to 527, inclusive), the public thereby being fully protected, and this applies also to service.

Ninth: That all parties are protected if the grant is perpetual. The public have the Railway facilities, the Company has its investment protected, and the State, through its Public Utilities Commission, having full power and authority to fix and determine the rate of fare to be charged and the kind of service to be given, insures to the public a reasonable rate of fare and a proper operation.

Respectfully submitted,

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JOHN C. WEADOCK,
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Solicitor for Plaintiff in Error, The Cleveland Trust Company.

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No. 60

OCTOBER TERM, 1916.

IN THE

Supreme Court of the United States

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY AND THE CLEVELAND TRUST COMPANY, Plaintiffs in Error,

vs.

THE STATE OF OHIO ON THE RELATION OF HUBERT C. PONTIUS, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR, THE NORTHERN OHIO TRACTION AND LIGHT COMPANY.

JOHN C. WELTY,
JOHN C. WEADOCK,
JOSEPH S. CLARK,
Solicitors for Plaintiff in Error,
The Northern Ohio Traction and Light Company.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916. NO. 313.

The Northern Ohio Traction and Light Company and The Cleveland Trust Company

vs.

The State of Ohio on the Relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The facts of this case have been set forth in the brief for the plaintiff in error heretofore filed, to which this brief is a supplement. At the risk of some duplication we call attention to the following:—

First.—On February 22d, 1892, the County Commissioners of Stark County passed a resolution which is quoted in full in the petition in *quo warranto* filed in this

case (Record, page 25). This resolution granted the right

> "to William A. Lynch, and to such railroad company as he may cause to be incorporated for that purpose, to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon between the line of the Canton Street Railway and the corporate limits of the city of Massillon."

The terms and conditions of the grant are set forth in this resolution.

Second.—Lynch caused the Canton-Massillon Electric Railway Company to be incorporated and transferred to it all of the rights granted by the above resolution of February 22d, 1892, and thereafter this Railway Company constructed an interurban electric railroad on this highway between the cities of Canton and Massillon under the authority given by said resolution, and on the margin of the resolution in the official record the following words were written:—

> "Transferred to Canton-Akron Ry. Co. July 2nd, 1902, A. D. W. M. Reed, Auditor."

This Railway Company was succeeded by the Canton-Akron Railway Company, which was later succeeded by the Canton-Akron Consolidated Railway Company, which was later, to-wit, on October 13th, 1906, succeeded by the Northern Ohio Traction and Light Company, plaintiff-in-error, hereinafter called the "Traction Company," and said Traction Company has since said date continuously operated said line of railway (see Stipulation, Record, pages 72–73).

Third.—On May 3d, 1909, the Commissioners of Stark County adopted another resolution reciting the above-

mentioned resolution of February 22d, 1892, and that the railway had been built and operated thereunder and that all rights under said resolution were then owned and controlled by the Traction Company, and providing that permission be given to the Traction Company, its successors and assigns, to remove its tracks from the side of the highway to the center, and further providing

> "that the rights herein granted the Northern Ohio Traction and Light Company, its successors and assigns, to lay said additional track upon said highway and to operate cars thereover and to become a part of its system of railways to be used in connection with its track now upon said highway shall be upon the same terms and conditions as the original grant authorizing the building, construction and operating of said electric railway as hereinbefore set forth." (See Resolution, Record pages 65–66.)

Fourth.—On March 27th, 1912, the Commissioners of Stark County passed a resolution reciting the earlier resolution of February 22nd, 1892, and the fares charged by the Traction Company for transportation over its railway lines, and providing that unless on or before April 27th, 1912, the fares were reduced to the figures mentioned in the resolution

> "the said grant given to said William A. Lynch on February 22nd, 1892, to operate an electric railroad between the said cities of Canton and Massillon is hereby declared terminated,"

and the prosecuting attorney was instructed to take legal proceedings to remove the railway from the highway (see Resolution, Record, page 69).

Fifth.—On April 26th, 1912, the Commissioners of Stark County adopted another resolution reciting a proposition made by the company which makes no

statement that it would comply with the demands of the above resolution of March 27th, 1912, and providing that if the demands of said resolution are not met by the Company on or before the time mentioned in said resolution of March 27th, 1912, the prosecuting attorney shall institute proceedings to restrain the Company from operating its railway and to compel it to remove its railway from the public highway (see Resolution, Record, pages 70–71).

Sixth.—On February 19th, 1913, the County Commissioners of Stark County passed another resolution reciting the resolution of February 22nd, 1892, and that the electric railway was built thereafter and that the cars were then being operated by The Northern Ohio Traction and Light Company, and further reciting certain contentions of the Commissioners, to wit:—

(1) That when the resolution of 1892 was enacted Lynch was not an incorporated company and not entitled to the privileges which said resolution undertook to confer; and

(2) That whatever rights were granted by said resolution were granted to Lynch alone, the grant being a personal one; and

(3) That the grant contained in said resolution

> "is an indeterminate one continuing from day to day and that said term extends and continues only so long as both parties to said grant and conveyance * * * agree and consent, and that said grant and conveyance can be terminated at any time by either party to said grant and conveyance, or those claiming to hold or holding under said grant."

This resolution provided:

> "that said term of said grant and conveyance be terminated on this date to take effect on this date

> and that the Board of Commissioners of Stark County, Ohio, refuse to extend to The Northern Ohio Traction and Light Company * * * the term for the operation of the aforesaid interurban electric railroad beyond this date."

This resolution further provided that the Traction Company be notified that the Commissioners have terminated the grant and that the County and the Commissioners regard the operation of the railway thereafter

> "a usurpation and infringement upon the rights of said Stark County of Ohio and the Board of Commissioners of said Stark County, Ohio."

This resolution further provided that the prosecuting attorney should take whatever steps may be necessary to prevent the Traction Company from continuing to operate the railway and that the Traction Company be directed to remove its railway from the highway. (see Resolution, Record pages 26–29).

Upon these facts the Supreme Court of Ohio, on October 19th, 1915, filed the following opinion and order:

> "This cause came on to be heard on the pleadings and the evidence and was argued by counsel. On consideration whereof the court finds upon the issues joined in favor of the plaintiff on the authority of Gas Company *vs.* the City of Akron, 81 Ohio State, 33. It is therefore ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges and franchise described in the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches from the said Canton and Massillon road between the corporate limits of the said cities of Canton and Massillon within ninety days from this date. It is further ordered and adjudged that the

plaintiff recover of the defendant its costs herein fixed at $." (See Record page 17.)

An elaborate dissenting opinion was filed by Judge Jones (Record pages 18–23) in which Crow, C. J., and Judges Summers and Price concurred.

THE QUESTION PRESENTED.

The petition in *quo warranto* (Record page 24) states that the Traction Company is a corporation duly organized under the laws of the State of Ohio engaged in operating an interurban electric railroad on the public highway between the cities of Massillon and Canton. It then recites the resolution of February 22nd, 1892 and the resolution of February 19th, 1913, quoting both in full, and showing that the latter resolution recites the earlier one, and also recites the three contentions mentioned above of the County Commissioners in regard to the earlier resolution. The first two contentions, to-wit, that Lynch being an individual was not entitled to the privileges and that whatever privileges were conferred were personal to Lynch, are without merit for, apart from other reasons, the Commissioners recognized the Canton-Akron Railway Company as the owner of the franchise contract by the memorandum written on the margin of the official record to that effect quoted above; and later by the resolution of May 3rd, 1909, the Commissioners recognized the Traction Company as the owner of the rights conferred by this resolution of February 22nd, 1892.

The third contention presents the question whether this franchise resolution was revocable at the will of the municipality. The reason for the effort of the Commissioners to oust the Traction Company from the highway was its refusal to reduce the rates charged for transportation when requested by the Commissioners to make such

reduction. The resolution of 1892, confirmed by the resolution of 1909, duly accepted, evidence contracts and no right was reserved therein by the Commissioners to revoke, annul or terminate them. Upon the faith of these contracts the Traction Company expended large sums of money upon its railway line. Unless the State of Ohio can maintain the position set forth in the resolution of 1913 as the third contention of the Commissioners, to-wit, that the rights conferred by the resolution of 1892 continue only so long as both parties agree and consent, that is, that these rights are revocable at will, by the County Commissioners, the resolution of 1913 must be held to be invalid, null and void. The jurisdiction of this Court, of course, is based upon the proposition that the resolutions of 1892 and 1909, duly accepted, evidence contracts and that the resolution of 1913 is a subsequent act of legislation which impairs, or attempts to impair, the obligation of these contracts.

EAST OHIO GAS CO. *VS.* CITY OF AKRON, 81 OHIO STATE, 33, 90 N. E. 40..

The Supreme Court of Ohio rested its decision in the present case upon its former decision in this Akron Gas case. In that case the East Ohio Gas Company, duly incorporated under the laws of the State of Ohio for the purpose, *inter alia*, of producing and furnishing gas in certain cities, laid its gas mains in the City of Akron under the authority of an ordinance passed on September 26th, 1898, and duly accepted by the Company. In speaking of that ordinance the Court, in its opinion, said that it will scarcely be disputed that it "and its acceptance by the Company constituted a contract." By this ordinance the City granted to the Gas Company the right to enter upon the streets and construct, maintain, operate and repair its gas mains, but there was no stipulation "as to the time when the use of the streets for the purposes of the Gas Company should end." Section 6 of the ordinance contained a provision regulating the price of gas

for ten years. This provision was inserted in pursuance of the authority conferred by Sections 2478 and 2479 of the Revised Statutes of 1880. At the end of the ten year period the City authorities adopted another ordinance requiring the Company to furnish gas at a much lower price. The Gas Company declined to accept the lower rates and signified its intention of discontinuing its business in the City and wholly withdrawing therefrom. Whereupon the City filed its petition asking for an injunction to restrain the Gas Company from ceasing its operations in the City and removing its property from the streets. The substance of the decision is the following:—

> "It comes then to this: That in the absence of limitation as to time, the termination of the franchise is indefinite and to preserve mutuality in the contract the franchise can continue only so long as both parties are consenting thereto. Or, to state it concretely, the contract, being silent as to the duration of the franchise and the ten year agreement as to the price of gas having expired, the city may, under its power of regulation, impose new conditions as to price and the Gas Company may accept or reject these."

A franchise contract with a municipality which is unlimited in time may be construed to be either (1) perpetual, or (2) revocable at will, or (3) a contract for a definite period which may be implied from the surrounding facts and circumstances. The Supreme Court of Ohio in the present case must have considered that in the Akron Gas case it had held that the franchise under consideration there was revocable at will. It is not at all clear from the opinion in the Akron Gas case that that was the intention of the Court. Such a conclusion is not to be adopted without a great deal of hesitation, for it is contrary to the great weight of authority, not only in this Court, but in the Courts of last resort of most of the States. It is clear that the Court in the Akron Gas

case did not hold the franchise, which it was construing, a perpetual franchise. It said:—

> "May we infer from this silence that the Gas Company has a perpetual franchise in the streets? We are not now prepared to hold that the Company has thus acquired such a perpetual franchise."

If the Akron Gas franchise had been held to be perpetual, the Gas Company could not have withdrawn from the City without its consent, but also the City could not have imposed upon the Gas Company confiscatory rates. The City had the power to regulate the rates, but not to prescribe confiscatory rates. The Gas Company's contract with the City had been in existence for the ten year period during which the rates were agreed upon. That period had expired. The Court was called upon to determine the intention of the parties to that contract in regard to the time that the right given to the Gas Company to operate within the City should exist, that is, the intention of the parties in regard to the duration of this franchise right. The natural conclusion was that the parties intended to have the right expire at the termination of the ten year period unless it should be then renewed by mutual consent. This case, therefore, is properly classified among those in which the Court finds from the surrounding facts and circumstances that the parties intended, that the right should expire at a specified time, although no date for the termination of the right was expressly named. In this same class of cases should be placed those cases which hold that a franchise contract without limitation of time should be construed to run for the life of the grantee corporation. There are several cases in Illinois to this effect, also in other jurisdictions. In this same class should be placed those cases which hold that a franchise contract without limitation expires with the life of the donor municipality. The class first mentioned above, which interprets such a contract to expire with the life of the donee, is expressly

disapproved by this Court in Owensboro *vs.* Cumberland Telephone & Telegraph Co., 230 U. S. 58. The surrounding facts and circumstances, however, may indicate an intention that the franchise contract shall have a specified time limitation. For example, in Blair *vs.* Chicago Traction Co., 201 U. S. 400, this Court held that a municipal franchise without limitation of time, granted by a suburban municipality just outside of the city of Chicago, to the Traction Company, operating a system of railway within that city, was intended to continue until the termination of the franchise under which the company was operating within the city limits. In City of Owensboro *vs.* Owensboro Water Works Company, 243 U. S. 166, 61 L. Ed., the principal point under discussion, and which in fact formed the basis for the dissenting opinion, was whether the facts and circumstances did not indicate an intention that the franchise should be limited to the term of the charter of the grantee corporation and not for the extended corporate life secured by an extension of the charter under the provisions of the statute authorizing such extension. The Court held that the intention of the contract was that the right should continue during the extended life of the corporation, but the Court was not unanimous in this interpretation. Seaboard Air Line Railway *vs.* Raleigh, 242 U. S. 15, 61 L. Ed. 121, is an excellent example of a case where the right conferred was a mere license revocable at will. The city of Raleigh, by its Board of Aldermen, adopted the following, which was entered upon the official record:—

> "Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

The Court held that this was a mere license revocable at will. The following appears in the opinion:—

"But the contention is that, although it be conceded that the well-settled rule is that general implications may not be resorted to for the purpose of converting a grant of a municipality which is, upon its face, a mere license, into a contract for a stated period or in perpetuity, nevertheless that rule is subject to a well-defined limitation or exception which, as presented in the argument in various forms, may be stated as follows:—That where general powers are conferred and duties are imposed upon a corporation which, from their nature and essential character, presuppose the right to exert them or the duty to perform them during a specified time or in perpetuity, and a particular power or right is conferred on the corporation which has a necessary relation thereto or an essential connection therewith, although such particular power or right may not have expressly taken the form of contract or grant for a stated time or in perpetuity, nevertheless such result may be implied by considering the essential relation which the particular power or right granted bears to the general powers and duties possessed and the necessary connection between the two for the purpose of giving a common duration to both."

In support of this proposition the Court cited the Cumberland Telephone Company and other cases referred to above.

The real question in all these cases is one of interpretation. When the Akron Gas case was decided by the Supreme Court of Ohio in the year 1909, the true interpretation of a franchise without limitation of time, where there were no facts or circumstances indicating an intention to limit the life of the franchise to a specified date, was involved in considerable uncertainty. Since that date and as the result of comparatively recent decisions in this Court, the rule has become well settled and established that a franchise without limitation of

time, in the absence of any facts or circumstances such as are indicated above, is a perpetual franchise.

Although it seems reasonable to place the Akron Gas case in that class of cases where the facts and circumstances indicate an intention to limit the franchise to the specified time, to-wit, the ten year period during which the price of gas was fixed, the Supreme Court of Ohio apparently does not agree to that interpretation for it held in the present case that a municipal franchise contract without limitation of time is revocable at will and it bases that conclusion upon this decision in the Akron Gas case. This conclusion is not in accord with the decisions of this Court, which have been fully discussed in this brief and in the brief to which this is a supplement.

We are not met with a line of authorities in the State of Ohio to the effect that such rights are revocable at will. On the contrary, in the elaborate opinion filed in State *ex rel* Columbus Railway Co., 24 Ohio Cir. Ct. 609, such a municipal contract was held to be perpetual. This same conclusion is reached by Sater, District Judge, in Cincinnati *vs.* Cincinnati & Hamilton Traction Company and Ohio Traction Company in his decision in the District Court of the United States for the Southern District of Ohio from which an appeal is now pending in this Court, being No. 600 of October Term 1914. Judge Sater's decision appears at pages 29 *et seq.* in the transcript of record in that case. He says at page 30:—

> "A valid grant of the right to occupy a street or highway for the conduct of a street or interurban railway business is a grant of a property right in perpetuity, unless its duration is limited by the grant itself, or by the general law of the State, or by the county commissioners or the corporate powers of the municipality making the grant. Owensboro *vs.* Cumberland Telephone Co., pages 65, 66; Detroit *vs.* Detroit Citizens' St. Ry. Co., 184 U. S. 368, 395; Louisville *vs.* Cumberland Telephone Co., State *vs.* Traction Co., 15 Ohio C. C., (N. S.) 577, 585, 586.

The Supreme Court of the State has made no ruling on the question as to the perpetuity of a franchise."

Judge Sater's decision was filed on July 9th, 1914 and the decision of the Supreme Court of Ohio in the present case was not filed until October 19th, 1915. The decision in the Akron Gas case was filed October 19th, 1909. It is evident that Judge Sater did not interpret that decision to mean that a municipal contract of the kind under discussion is revocable at the will of the municipality for it will be noticed that in the above quotation he says that the Supreme Court of the State has made no ruling on the question of the perpetuity of a franchise.

RESERVED POWER TO ALTER, AMEND AND REPEAL.

The authority of the Commissioners of Stark County to adopt the resolution of 1913, by which they attempted to terminate the franchise contract of 1892, may be considered in two aspects, to wit:—

First.—On the theory that the resolution of 1892, when properly interpreted, means that the term of the grant, being indeterminate, continues only so long as both parties may agree and consent, just as was contended by the Commissioners in their resolution of 1913. If this is the correct interpretation of the resolution of 1892 it was, of course, subject to revocation and cancellation at any time at the will of either party. This is evidently the view taken by the Supreme Court of the State of Ohio and this view is, as heretofore stated, contrary to the great weight of authority and expressly contrary to a number of the decisions of this Court, which are discussed in the Brief heretofore filed for the Traction Company. On the other hand, this question may be considered:—

Second.—On the theory that the resolution of 1892, although not intended to be subject to cancellation at

the will of either party, was nevertheless subject to revocation under the reserved power to alter, amend and repeal. This was the theory discussed by Judge Jones in his dissenting opinion (Record, page 18). He held that this resolution was subject to revocation by the General Assembly under the provisions of Article 1, Section 2, of the Constitution, which provides that

> "No special privileges or immunities shall ever be granted that may not be later revoked or repealed by the General Assembly."

But he further held that although this power of revocation might be exercised by the General Assembly, it had never been delegated to the County Commissioners and could not be exercised by them and on that account the resolution of revocation adopted in 1913 was of no force and effect. A similar municipal franchise contract was held to be perpetual but subject to revocation by the General Assembly under the reserved power, but not by the municipality in State *ex rel* Taylor *vs.* Columbus Railway Company, 24 Ohio Cir. Ct. R. 609. This case went to the Supreme Court of Ohio where it was confirmed without deciding the duration of the franchise. See 73 Ohio State 363. The decision in the Lower Court is cited with approval in Cleveland Electric Railway *vs.* City of Cleveland, 137 Fed. 111. It may well be doubted, however, whether a municipal franchise contract, such as the resolution of 1892, is a special privilege or immunity within the meaning of Article I, Section 2 of the Constitution. In Louisville *vs.* Cumberland Telephone and Telegraph Co., 224 U. S. 659 this Court, in speaking of a similar franchise contract to which the City of Louisville, Kentucky, was a party, the provisions of the Kentucky laws being very similar, said:—

> "The general repeal of all special privileges referred to in the statute related to exclusive grants, tax exemptions, monopolies and similar immunities (Kentucky Stat. Sec. 573; Covington *vs.* Kentucky, 173 U. S. 231, 43 L. Ed. 679, 19 Sup. Ct. Rep. 383)

> and not to those corporate powers and property rights needed and conferred in order to enable the Company to perform the duties for which it had been organized."

In Old Colony Trust Co. *vs.* Omaha, 230 U. S. 111, this Court, in speaking of a similar municipal contract, said:—

> "But it is said that this grant cannot be held to be in perpetuity because to do so is to bring it in conflict with Section 16 of Article I of the State Constitution which declares that 'no law making any irrevocable grant of special privileges or immunities shall be passed;' and this contention is made although it is conceded, as it must be, that the grant is not exclusive and does not prevent the City from making like grants to others and from establishing and operating a competing municipal plant."

This contention was held to be answered by the decision in Plattsmouth *vs.* Nebraska Telephone Co., 80 Neb. 460, from which the Court quoted with approval the following:

> "A special privilege in constitutional law is a right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons, to the exclusion of others and in derogation of common right. Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city at any time to extend to other companies or corporations the same privileges awarded to the defendant. The contention, therefore, that Ordinance No. 91 is void and confers no right upon the defendant cannot be sustained."

It is, however, immaterial for the purposes of this case whether the franchise resolution of 1892 is or is not a special privilege or immunity within the scope of

Article I, Section 2 of the Constitution, for it is clear that even if it is, and is on that account subject to revocation, the right to revoke is vested in the General Assembly and not in the County Commissioners. This is the decision in State *ex rel* Taylor *vs.* Columbus Railway Company, 24 Ohio Cir. Ct. R. 609 referred to above.

In Louisville *vs.* Cumberland Telephone & Telegraph Co., 224 U. S. 649, the first point in the syllabus says:

> "The assent of the municipality, when once given conformably to the charter of a telephone company, empowering the latter, with and by the consent of the city counsel, to construct and maintain a telephone system in the city, perfects the company's franchise which, being a legislative grant, cannot thereafter be repealed, nullified or forfeited by municipal ordinance."

In Grand Trunk Rwy. Co. *vs.* South Bend, 227 U. S. 544, this Court said in commenting upon a municipal consent given to the railway company:

> "When such consent was once given the condition precedent had been performed and the street franchise was thereafter held, not from the city, but from the state which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself."

See also New York Electric Lines Co. *vs.* Empire City Subway Co. 235 U. S. 185, 59 L. Ed. 184.

We respectfully submit, for the reasons hereinbefore set forth, that the decision of the Supreme Court of Ohio should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. [redacted] 60

THE NORTHERN OHIO TRACTION & LIGHT COMPANY
AND
THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

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On the Relation of Hubert C. Pontius,
Prosecuting Attorney of Stark County, Ohio.

In Error to the
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BRIEF OF DEFENDANT IN ERROR.

FRANK N. SWEITZER,
Prosecuting Attorney of Stark County, Ohio, and
HUBERT C. PONTIUS,
Solicitors for Defendant in Error.

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Solicitors for Defendant in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 313.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY
AND
THE CLEVELAND TRUST COMPANY,
Plaintiffs in Error,

vs.

THE STATE OF OHIO
On the Relation of Hubert C. Pontius,
Prosecuting Attorney of Stark County, Ohio.

In Error to the
Supreme Court of the State of Ohio.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The original action is one in *quo warranto* involving the interpretation and construction of a grant made by the Commissioners of Stark County, Ohio, to the predecessors of The Northern Ohio Traction & Light Company, an Ohio corporation engaged in operating an interurban electric railway upon a public highway, leading from Massillon to Canton in said County. The Supreme Court of Ohio interpreted this grant, holding that the grant in question, under its terms, has expired and that The Northern Ohio Traction & Light Company is unlawfully occupying the public highway in question.

The grant was made in 1892, and is silent as to time of duration.

In 1913 the Commissioners of the County passed a resolution directing The Northern Ohio Traction & Light

Company to remove from the highway in question. This the company refused to do and advised the Commissioners that the grant made in 1892 is perpetual inasmuch as it contains no express provision as to the time the company should be permitted to operate upon said highway.

Thereupon, this action in *quo warranto* was instituted in the Supreme Court of Ohio. It is here on a writ of error to that state court.

Taken From Brief of Plaintiff in Error.	*Defendant in Error's Comments.*
This case comes before this Court on a writ of error (record page 9) to the Supreme Court of Ohio, allowed by Hon. Hugh L. Nichols, Chief Justice of the Supreme Court of Ohio (record page 17).	
The parties stand in this Court in the reverse relation to that in which they stood in the Supreme Court of Ohio, but for convenience, will be referred to in this brief as plaintiff or relator, and defendant respectively, as was their status in the Supreme Court of Ohio.	Defendant in error's brief refers to the parties as they stand in this court.
This is an action in quo warranto, begun in the Supreme Court of Ohio, to oust the defendant from its use of the public highway between the cities of Canton and Massillon, Ohio, and to have adjudged terminated the franchise under which the defendant; The Northern Ohio Traction and Light Company, claims the right to occupy a portion of said highway with its inter-urban railway.	
The Supreme Court of Ohio found in favor of the plaintiff, and ordered and adjudged that the defendant, The Northern Ohio Traction and Light Company, be ousted, and that it remove its tracks and switches from said highway within ninety (90) days. This decision was made by a divided Court, three of the seven Justices dissenting.	This case is reported in 93 Ohio St., page 466. The judgment is as follows : "Judgment for relator on authority of The East Ohio Gas Company vs. The City of Akron, 81 Ohio St., 33. Judgment for relator."

The Court issued no opinion in support of the judgment, but a dissenting opinion in which the three dissenting Judges concurred, was issued and filed, and is set forth at page 18 of the record herein.

Further reference is made to 81 Ohio St. 33, later in the brief.

This defendant claims the right to occupy said highway by virtue of a resolution passed on February 22nd, 1892, by the County Commissioners of Stark County, Ohio, granting unto William A. Lynch and such railroad company as he may cause to be incorporated, the right to locate, construct, maintain and operate an electric railroad along either side of the State Road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the City of Massillon. (Record, page 64.) The Resolution specified no time for the duration of the franchise and the relator claims that it is, therefore, terminable at will.

The grant of 1892 is printed on page 64 of the TRANSCRIPT OF RECORD herein.

The resolution referred to is silent as to time of duration. By its terms the grant is exclusive.

The constitution of Ohio of 1851 makes perpetual grants impossible.

After the passage of this resolution, which was accepted by said William A. Lynch, the latter caused to be incorporated The Canton-Massillon Electric Railway Company, an Ohio corporation, and transferred and assigned to it, its successors and assigns, all his right, title and interest in and to said franchise. (Stipulation, Record, page 72.)

In 1892, the date of the grant in question, Commissioners were not authorized by Statute to make grants such as plaintiffs in error claim this grant to be. (The Statutes in effect at that time are quoted later in this brief.)

The Canton-Massillon Electric Railway Company, under said franchise, constructed an interurban electric railroad along said highway between the cities of Canton and Massillon, which railroad is now owned and operated by the defendant, The Northern Ohio Traction & Light Company, under and by virtue of the assignments and transfers hereinafter mentioned.

On June 17th, 1902, said The Canton-Massillon Electric Railway Company duly assigned and transferred to The Canton-Akron Railway Company, an Ohio corporation, its successors and

assigns, all its right, title and interest in and to said electric railroad and said franchise. (Stipulation, Record, page 72.) This assignment was recognized and ratified by the Board of County Commissioners of Stark County, Ohio, by the following inscription, which appears upon the margin of page 18 of Volume 8 of the Commissioners' Journal, upon which also is recorded the said resolution of February 22nd, 1892, creating the franchise in controversy: "Transferred to Canton-Akron Railway Company, July 2nd, 1902, A. D. W. M. Reed, Auditor." (Record, page 65.)

Thereafter the railroad and said franchise were conveyed by said The Canton-Akron Railway Company to The Canton-Akron Consolidated Railway Company, an Ohio corporation, its successors and assigns, by deed dated October 10th, 1906. (Stipulation Record, page 73.) All of these railway corporations have been in continuous existence from their organization down to the present time.

Since its construction by said The Canton-Massillon Electric Railway Company, in 1892, the said electric railroad extending between the cities of Canton and Massillon has been continuously operated up to the present time by the above mentioned electric railway companies during their respective periods of ownership. During that period also several mortgages have been placed upon said electric railroad, securing bonds for large amounts of money, which have been purchased by the general investing public, and large sums of money realized from the sale of said bonds have been invested in the improvement and betterment of said electric railroad. These bond issues secured by mortgages upon said electric railroad may be briefly described as follows:

The mortgages, etc., referred to, covered not only the right of way in question but lines consisting of many miles, including the city electric lines of the cities of Canton and Massillon, Ohio. (Defendants Exhibits No. 3 and No. 4.)

1. Deed of trust from The Canton-Massillon Electric Rail-

The record discloses (Record, page 83) that the plaintiff in er-

way Company, to The Cleveland Trust Company, Trustee, dated May 1st, 1900, securing $850,000.00 par value of twenty-year, five per cent gold bonds issued and still outstanding. (Defendant's Exhibit No. 2, Record, pages 73, 74 and 79.)

2. Deed of trust from The Canton-Akron Railway Company to The Knickerbocker Trust Company of New York, dated March 1st, 1902, securing issue of five per cent twenty-year gold bonds; authorized issue, $2,000,000.00. Issued and still outstanding bonds of par value of $1,150,000.00. (Defendant's Exhibit No. 3, Record, pages 74 and 79.)

3. Deed of trust from The Canton-Akron Consolidated Railway Company to The Citizens' Savings & Trust Company, of Cleveland, and S. Reed Anthony, Trustees, dated October 12th, 1906, securing an issue of Consolidated five per cent gold bonds; due in 1933. Authorized issue, $2,500,000.00. Issued and outstanding par value of bonds $1,052,000.00. Issued and deposited as collateral securing collateral trust notes of The Northern Ohio Traction & Light Company for $1,500,000.00 bonds of the par value of $1,000,000.00. Bonds certified and authorized to be issued by the Public Utilities Commission of Ohio, $58,000.00. Bonds held in escrow to retire $100,000.00 par value of the bonds of The Tuscarawas Railroad Company, $100,000.00. Total bonds issued and outstanding $2,210,000.00. (Defendant's Exhibit No. 4, Rec., pp. 75, 79, 80 and 81.)

All of the bonds mentioned above as issued and outstanding, are still unpaid, and are held by large numbers of the investing public scattered throughout the United States. (Record, page 81.)

At the time the County Commissioners of Stark County, Ohio, passed the resolution of

ror, The Northern Ohio Traction & Light Company, has a mileage of two hundred thirty-three and twenty-two one hundredth miles of trackage; that the trackage on the Canton-Massillon Road owned by it is about five and one-half miles (Record, page 96); that the total value of property of The Northern Ohio Traction & Light Company on December 31st, 1913, according to the Company's trial balance was Twenty-five Million, Three hundred twenty-seven thousand, Two hundred forty-nine and 27-100 ($25,327,249.27) Dollars, and that the total issue of capital stock of the plaintiff in error, The Northern Ohio Traction & Light Company, on December 31st, 1913, was Eleven Million, Eight Hundred Twenty Four Thousand, and Three Hundred and Twenty ($11,824,300.00) Dollars; and that the bonded indebtedness of the plaintiff in error, The Northern Ohio Traction & Light Company, including the mortgage bonds of which The Cleveland Trust Company is Trustee, amounted to Eleven Million, Six Hundred and Sixty Eight ($11,000,668.00) Dollars. (Record, page 86.)

The bonds referred to are well secured by other lines and city systems.

The Statutes referred to are Sections 3437 and 3438 Revised Statutes of Ohio.

February 22nd, 1892, conferring the franchise under which the defendant is operating said electric railroad, the statutes of Ohio conferred authority upon said County Commissioners to grant such a franchise, without any limitation as to the duration of the grant, and the County Commissioners had a full power to grant a perpetual franchise, if they so desired. It was assumed by Mr. Lynch and the railway company which he organized, that the said resolution of February 22nd, 1892, did confer upon them a perpetual franchise, and it is so stated in the minutes of that company, The Canton-Massillon Electric Railway Company, as shown by the record at pages 92 and 93. Likewise it has always been assumed by all parties concerned in the transfers of the franchise and the issuance of mortgages and bond issues upon said railroad and franchise as above outlined, that the grant was a perpetual one. Likewise, many of the inhabitants in the neighborhood of Canton and Massillon have acted in reliance upon the permanency of the location of said electric railroad, and of said franchise, by erecting valuable improvements along said railroad, which would only be accessible by the continued maintenance and operation of that railroad. At Reedurban, allotments have been laid out, and many homes and valuable improvements made thereon and a Catholic College, known as Mount Marie College, was built about six or seven years ago. This college is located about three and five-eighths miles from the Public Square in Canton and about a mile and a half from the city limits of Canton, and about four and three-eighths miles from the city of Massillon. (Record, pages 111, 114, 116.)

According to the testimony shown at the above pages of the Record, large numbers of students of this college are day students, depending upon the electric railroad in question for go-

Section 3437 R. S. provided as follows:

"Street railways with single or double tracks, side tracks and turn-outs may be constructed or extended within or without or partly within and partly without any municipal corporation or unincorporated village, and offices, depots, and other necessary buildings for such railways may also be constructed."

Section 3438 R. S. provided:

"The right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted only by the Council thereof by ordinance, **and the right to construct such railway within or beyond the limits of an unincorporated village, can be granted only by the County Commissioners by an order entered on their Journal, etc.**"

Plaintiff in error's statement that it has always been assumed by all parties concerned that the grant in question is perpetual, etc., is a mere conclusion, not borne out by facts.

Defendant in error contends that plaintiff in error's statement in the opposite column has no bearing on the case.

Under the laws of Ohio, electric railways may change their

ing to and from said College and would have no practical means of attending the College but for the maintenance and operation of that electric railroad. According to the witness, Mrs. Austin A. Lynch, the buildings of this College represent an investment of over one hundred and seventy-five thousand dollars ($175,000.00) and plans of the College contemplate considerable further construction of buildings, and the school has an attendance of about one hundred and twenty-five pupils. (Record, pages 89 and 90.)

Furthermore, the defendant, The Northern Ohio Traction & Light Company, is the owner and operator of a continuous line of electric railways between the cities of Cleveland, Akron, Canton, Massillon and Uhrichsville, and the eight miles of railroad involved in this suit, running between the cities of Canton and Massillon, are an integral part of this electric railway system, extending from Cleveland in Cuyahoga County to Uhrichsville in Tuscarawas County. (Record, pages 100 and 101.) Also the defendant is the owner and operator of the street railway systems in Canton and Massillon, and they are made practically one system by the connecting railway in question.

Ouster of this defendant from the road in question, therefore, would have not only the effect of destroying the security of the bondholders, impairing the value of adjoining property, and greatly inconveniencing the local public, but would break the chain of this defendant's continuous railway system, and would make impossible the performance of this defendant's duties as a common carrier between the cities of Cleveland, Canton, Massillon and Uhrichsville, thereby greatly inconveniencing the public at large throughout the northern part of Ohio.

The relator, in cross-examining the property owners who testified course and route from time to time. (Sections 9115, 9116, 9119 and 9122, General Code of Ohio.)

This same argument might be advanced with reference to any electric line changing its route.

The property owners referred to are not parties to this suit.

This is no valid reason why the traction company should occupy the highway in question unlawfully.

As heretofore indicated, the record discloses that mortgagees and bond holders are amply secured without the right of way in question in this suit.

tified in this case as to the damage to their property and to the above mentioned College, which would follow from the abandonment of the railroad in question, brought forth the answer several times, that no operation of an electric railroad between Canton and Massillon by any other party than this defendant could replace the service rendered by this defendant, because of the fact that this defendant operated an entire system of railroad between Cleveland and Uhrichsville, thereby making the property along this line between Canton and Massillon accessible to all points between Cleveland and Uhrichsville. (Record, pages 115 and 116.)

The first intimation that even the County Commissioners of Stark County doubted the perpetuity of the grant appeared in 1912, when a dispute had arisen between this defendant and the Commissioners as to the rate of fare to be charged for the transportation of passengers between Canton and Massillon. This dispute arose after the decision by the Supreme Court of Ohio of the case of The East Ohio Gas Company against the City of Akron, 81 O. S., page 33, which decision, the Prosecuting Attorney of Stark County advised the Commissioners (as we shall show, erroneously), made the grant to this defendant terminable at will. Thereupon, the County Commissioners instead of applying to the proper tribunal, to-wit, the Public Utilities Commission, for the regulation of such transportation rates, attempted to use this decision of the Supreme Court as a club to coerce this defendant into accepting the rates of fare prescribed by the Commissioners. (Record, page 69.)

Nor had there been any intimation on the part of the County Commissioners that they regarded the grant perpetual.

On March 27th, 1912, the Commissioners passed a resolution concluding that unless the Northern Ohio Traction & Light Company complied with the Commissioners' demands as to the reduction of fare on or before

This resolution is not the resolution upon which the quo warranto suit, filed in the Supreme Court of Ohio, to which the plaintiff in error now prosecutes error, is predicated.

April 27th, 1912, its franchise under said resolution of February 22nd, 1892, "is hereby declared terminated and the Prosecuting Attorney of this County is hereby instructed to take such legal proceedings as may be necessary to have such grant made null and void." (Record, pages 68, 69 and 70.)

This defendant declined to comply with the demands of that resolution, and, therefore, on April 26th, 1912, the County Commissioners passed another resolution, reciting that:

"If The Northern Ohio Traction & Light Company fail to comply with the demands of the former resolution, the Prosecuting Attorney is instructed to immediately take legal action against the said company, to compel it to remove its said electric railway from said public highway." (Record, pages 70 and 71.)

In obedience to these two resolutions, the Prosecuting Attorney of Stark County on August 13th, 1912, commenced an action in quo warranto in the then Circuit Court of Stark County, Ohio, said action being entitled "State of Ohio, on the relation of Charles Krichbaum, Prosecuting Attorney of Stark County, against the Northern Ohio Traction & Light Company." The record of this entire case is shown at pages 49 and 63 inclusive of the record herein.

A demurrer in that suit was sustained. The case was never heard on its merits.

That suit in no way affects the one at bar.

The petition in that action set forth in its entirety the resolution of February 22nd, 1892, granting the franchise in question, and also set forth in full the resolutions of the County Commissioners above referred to, passed on March 27th, 1912, and April 26th, 1912, and concluded with a prayer identical with that of the petition in the present case. This defendant filed a general and special demurrer to this petition, and the Circuit Court (by that time changed to the Court of Appeals) overruled the

The petition referred to here is of no consequence in the suit at bar. Neither the opinion of the Supreme Court of Ohio nor the opinion of the Judges dissenting, make any mention or reference to the action here referred to.

special demurrer which related to the Statute of Limitations, but sustained the first, second and fifth grounds of the general demurrer, which were:

1. That the petition did not state facts sufficient to constitute a cause of action against defendant.

2. That the petition did not state facts sufficient to entitle the plaintiff to the relief prayed for.

5. That the plaintiff had no legal capacity to try or bring this action. The third and fourth grounds, of the general demurrer, to-wit, that the court had no jurisdiction; and that the action was barred by the Statute of Limitations, were overruled. From this decision of the Circuit Court the plaintiff has never appealed or prosecuted error proceedings; the time for such proceedings has expired, and that judgment of the Circuit Court is a final decision of the issues involved in that case.

After the decision of that case as above outlined, the County Commissioners instead of prosecuting error or appealing the case, passed a new resolution, on February 19th, 1913, in no essential respect different from the resolution it had already passed on March 27th, 1912. This resolution is set forth in plaintiff's petition in the present suit at pages 26, 27, 28 and 29 of the Record herein. This resolution concluded as did the resolution of March 27th, 1912, that the said grant and conveyance is thereby terminated, and this defendant directed to remove its said railroad, and the Prosecuting Attorney is directed to institute this present suit. The only difference, therefore, between the suit now before this Honorable Court and the suit decided by the Circuit Court of Stark County, as above mentioned, is that since the decision of the latter case the County Commissioners have passed another resolution again

The Supreme Court of Ohio gave no heed or consideration to this contention of the plaintiff in error.

The resolution of February 19th, 1913, is an absolutely new resolution and differs very materially from the resolution of March 27th, 1912. The resolution of February 19th, 1913, is found on page 26 of the Record; that of March 27th, 1912, on page 53 of Record.

declaring terminated the franchise of this defendant upon the highway in question. The petition in both these cases raised the claim that the franchise in question was not assignable. No claim has been made upon this matter by the relator in the briefs or argument, and the matter was not considered by the Ohio Supreme Court.

Upon this issue, however, we call the Court's attention to the fact that not only have the Commissioners sat for over twenty-one years and permitted the above mentioned transfers and mortgages of said franchise to be made without objection, but the County Commissioners of Stark County have officially recognized the assignability of the grant by their resolution shown at page 65 of the Record herein, known as the Reedurban grant. This defendant sought a franchise from the County Commissioners of Stark County to place a double track along the highway in question at Reedurban, and the resolution conferring this grant to this defendant recited that:

"Whereas, on the 22nd day of February, 1892, the Board of Commissioners of Stark County, Ohio, did by resolution and proper proceedings then authorize and empower William Lynch, his heirs and assigns to lay, build, construct and operate an electric railroad upon the public highway between the cities of Canton, and Massillon, on what is known as the Canton-Massillon Road; and

Whereas, said electric street railway has been built and is being operated under said grant so made and all rights thereunder are now owned and controlled by The Northern Ohio Traction & Light Company, an incorporated company under the laws of Ohio." (Record, pages 65 and 66.)

Here we have an official recognition by the Commissioners

Inasmuch as the Supreme Court of Ohio gave this contention no consideration, we conclude it is of little significance.

not only of the assignability of the grant in question, but of the ownership thereof by this defendar.

The federal questions in this case were clearly raised in the Supreme Court of Ohio. It appears from the record herein that it was specifically pleaded by both defendants herein, and it was argued orally and in briefs by them that since said grant of franchise contained no provision as to the duration thereof, it was perpetual in duration, and the action of the Board of County Commissioners of Stark County, Ohio, by said resolution adopted February 19th, 1913, was an exercise of authority under the State of Ohio, repugnant to the constitution of the United States in that it was an impairment of the obligation of contract as between the Board of County Commissioners of Stark County, Ohio, and the defendants herein, and a taking without due process of law, of the property of the defendants, and a denial to the defendants of the equal protection of the law.

(Answers, Record, pages 37 and 46; Judgment, Record, page 17; Allowance of Writ, Record, page 18.)

The Supreme Court of Ohio, however, held that the grant in question was a mere license terminable at will by either party, and therefore sustained as constitutional the action of the County Commissioners declaring the grant terminated.

There is no federal question in this action. The only question involved is the construction of a grant. The Supreme Court of Ohio construed this grant and said in effect that the grant in question has expired and that the plaintiff in error, The Northern Ohio Traction & Light Company, is in unlawful possession of the highway in question.

The Supreme Court of Ohio held that the grant in question is a mere license terminable at the will of either party.

SPECIFICATIONS OF ERRORS RELIED UPON. BY PLAINTIFF IN ERROR.

Taken From Plaintiff in Error's Brief.	*Defendant in Error's Contentions.*
This defendant contends that the Supreme Court of Ohio erred in the following respects.	
1. The Supreme Court of Ohio erred in holding that the defendant's said grant and franchise was not perpetual in duration.	1. Plaintiff in error concedes that the Supreme Court of Ohio held that the grant is not perpetual in duration, and that a grant made in 1892 silent as to time is not in Ohio perpetual in duration.
2. The Supreme Court of Ohio erred in holding that the defendant's said grant was a mere license, terminable at the will of either party.	
3. The Supreme Court of Ohio erred in holding that the County Commissioners of Stark County, Ohio, had any authority reserved, delegated or otherwise, to forfeit said grant.	3. The Supreme Court of Ohio did not regard the action of the County Commissioners a forfeiture. This Court took the position that a perpetual grant had not been made. Therefore, when the railroad in question was requested to remove from the public road, there was no attempt on the part of the Commissioners to forfeit any grant already made. It cannot be contended therefore, that the Commissioners are attempting to forfeit any rights or privileges held by the railroad company.
4. The Supreme Court of Ohio erred in holding that the exercise of authority under the State of Ohio by the Board of County Commissioners of Stark County, Ohio, in adopting its resolution on February 19th, 1913, declaring terminated the defendant's grant and franchise, was not repugnant to the constitution of the United States, was not an impairment of the obligation of contract as between said Board of County Commissioners of Stark County, Ohio, and the defendants, and not a taking, without due process of law, of the property of the defendants herein, and that the same was not a denial to the de-	4. The question involved is not a federal question but a question of construction of a grant. The grant relied upon in this suit by the plaintiff in error under the holdings of the Supreme Court of Ohio in The State ex rel. Pontius vs. The Northern Ohio Traction & Light Company, 93 Ohio St., 466; East Ohio Gas Company vs. City of Akron, 81 Ohio St., 33; Railroad Company vs. Defiance, 52 Ohio St., 262, which case was affirmed in Wabash Railroad Co. vs. Defiance, 167 U. S., 88, is not a perpetual grant. The action of the County Commissioners, therefore, is not in any way repugnant to the Constitution of the United States and

fendants herein of the equal protection of the law.

5. The judgment of the Supreme Court of Ohio in this case was repugnant to the constitution of the United States in that the same was an impairment of the obligation of the defendant's contracts, and a taking, without due process of law, of their property, and a denial to the defendants of the equal protection of the law in contravention of the guaranties of the constitution of the United States.

is not an impairment of the obligation of contract.

5. The judgment of the Supreme Court of Ohio in this case is not repugnant to the constitution of the United States and is not an impairment of the obligation of defendant's grant, and is not a taking without due process of law, **when considered from the standpoint of the construction of the grant in question, under the law of Ohio.**

ARGUMENT

1. THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION IN THIS CASE AS NO FEDERAL QUESTION IS INVOLVED.

In 1892 plaintiff in error's predecessor obtained a grant from defendant in Error. (Record, pages 64 and 65.) The Supreme Court of Ohio (93 Ohio St., 466) relying upon and by authority of *The East Ohio Gas Company vs. The City of Akron* (81 Ohio St., 33) construed that grant. The question was not whether or not a grant existed, but what the grant meant. Under the Supreme Court of Ohio's construction, an Ohio grant, made in 1892, silent as to time, is not perpetual.

No effect whatever was given to any law of the State impairing obligation of contract. Nothing was done but to decide that upon the evidence the grant had expired by its own limitation. The Supreme Court of Ohio in its judgment gave no effect to any subsequent law but decided only that the right claimed by this plaintiff in error was not conferred by its grant.

This being the situation, the exposition given by the highest tribunal of the state must be taken as correct. The Supreme Court of the United States is not authorized to review the judgment of the highest court of the state merely because the Supreme Court of Ohio took a different view of this grant from that held by the plaintiff in error.

Turner vs. Wilkes County Commissioners, 173 U. S., 463.

> "But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a state court we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, and when it appears that the state court has done nothing more than construe its

own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject.

We are therefore bound by the decision of the state court in regard to the meaning of the constitution and laws of its own state, and its decision upon such a state of facts raises no federal question. Other principles obtain when the writ of error is to a federal court."

France vs. Missouri, 154 U. S., 667.

"No effect whatever was given to any law of the state impairing obligation of the grant. Nothing was done but to decide that upon the evidence the grant had expired by its own limitation. The contracts as presented and agreed on by both parties were construed and full effect given to all the obligations they were found to contain."

Sec. 709 R. S. of U. S.
172 U. S., 425—*Cap. Nat. Bank of Lincoln vs. First Nat. Bank of Cadiz.*
154 U. S., 667—*France vs. Missouri.*
79 U. S., 379—*Knox vs. Exchange Bank.*
105 U. S., 278—*Louisiana vs. Pilsbury.*
146 U. S., 162—*Morley vs. Lake Shore & Michigan Southern Railway Company.*
125 U. S., 18—*New Orleans Water Works Company vs. Louisiana Sugar Refining Company.*
151 U. S., 527—*Newport Light Company vs. Newport.*
142 U. S., 282—*St. Paul, Minneapolis & Manitoba Railway Co. vs. Todd County.*
173 U. S., 461—*Turner vs. Wilkes County Commissioners.*

Plaintiff in error in its brief, pages 18-20, cites a number of cases, quoting from *Stearns vs. Minnesota*, 179 U. S., 223; *Douglas vs. Kentucky*, 168 U. S., 488; *Louisville Gas Company vs. Citizens' Gas Company*, 115 U. S., 683; *Atlantic Coast Line vs. Goldsboro*, 232 U. S., 548, contending that the cases cited are precedents authorizing the Supreme Court of the United States to as-

sume jurisdiction in the case at bar. The rule laid down in the cases cited is not applicable to this case, for in this case the question is not whether or not a grant existed, but what did the grant existing, mean. Both the plaintiff in error and the defendant in error say that a grant had been made. Therefore, the existence or non-existence of the grant is not the subject of controversy. Even the cases cited by plaintiff in error in its brief, go only so far as to say that the jurisdiction of the Supreme Court of the United States under Section 709 R. S. of U. S. as to authorize it to assume jurisdiction in determining that the contract existed or did not exist. In the cases cited by plaintiff in error the decisions turned on the enactment of subsequent legislation.

In *New Orleans Water Works Company vs. Louisiana Sugar Refining Company*, 125 U. S., 18, it is held:

> "The provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, is aimed at the legislative power of the state, and not at decisions of its courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals."

And

> "This Court has no jurisdiction of a writ of error to the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state is upheld by the judgment sought to be reviewed; and when the state court gives no effect to a law of the state subsequent to the contract, but holds, upon grounds independent of that law, that the right claimed *was not conferred by the contract*, the writ of error must be dismissed for want of jurisdiction."

On page 25 in the same report of the same case appears the following:

> "And in many recent cases under Section 709 of the Revised Statutes, this Court speaking by the

> Chief Justice, has reasserted the rule, that to give it jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding it."

And on page 30:

> "The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

And on the same page:

> "This court, therefore, has no jurisdiction to review a judgment of the highest court of a state on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed."

2. THE GRANT IN QUESTION IS NOT PERPETUAL.

(a) The General Assembly of Ohio did not have authority to make perpetual grants.

The constitution of Ohio of 1851 which was in force and effect at the time of the making of the grant in question in 1892 contained the following provisions:

Article 1, Section 2, Ohio Constitution of 1851:

> "And no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

Article 13, Section 2:

> "Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed."

These provisions were adopted to supersede the rule of the *Dartmouth College* case. The General Assembly not having authority to make perpetual grants it follows that it did not have authority to authorize boards of county commissioners to make perpetual grants.

(b) The General Assembly did not authorize boards of county commissoners to make perpetual grants.

In 1892 the Statutes of Ohio contained the following sections and these are the sections relied upon by plaintiffs in error as the authority of the County Commissioners to make the grant in question.

Section 3437 of the Revised Statutes of Ohio:

> "*Street railways* with single or double tracks, side tracks and turn-outs, *may be constructed or extended within or without, or partly within and partly without, any municipal corporation, or unincorporated village,* and offices, depots and other necessary buildings for such railways may also be constructed."

Section 3438 of the Revised Statutes of Ohio:

> "*The right so to construct or extend such railway within or beyond the limits of a municipal corporation, can be granted only by the council thereof by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village, can be granted only by the county commissioners by order entered on their journal;* and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the County Commissioners, neither the municipal corporation nor the County Commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant, or renewal of a grant during the term for which said grant, or renewal, shall have been made. Provided that no authority shall be given by such municipal or county authority to occupy the track, whether single or double, or other structure, of any existing street railways for more than one-eighth of the entire distance between the termini of the route as actually constructed, operated and run over, of the Company, or individual, to whom such grant is made; except, however, in granting permission to extend existing routes in cities of the first, second and third grade of the first class, the first grade, second class, such cities and the companies owning such route shall have the same rights and powers they have under the laws and contracts now existing, and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been, or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of Sections 2501 and 2502."

Hence in 1892 the only statutory authority possessed by county commissioners as claimed by plaintiffs in error in their briefs, was to grant,

> "the right to construct such railway *within or beyond the limits of an unincorporated village.*"

And "such railway" referring to Section 3437, relates to street railways that

> "may be constructed or extended within or without, or partly within and partly without, any municipal corporation, or unincorporated village."

There is no claim made in this case that the road in question was constructed *within or beyond the limits of an unincorporated village.*

Counsel for plaintiffs in error evidently claim nothing for the provisions of Section 3441, Revised Statutes of Ohio, as it stood in 1892, for it is not mentioned in their briefs. However, in *Railroad Company vs. Commissioners,* 56 O. S., 1, it was held that a street railroad company in order *to extend* its lines outside the limits of a municipal corporation, upon the public highways, must obtain a grant from the board of commissioners of the county, and that Sections 3438 and 3441 must be construed together. The Supreme Court of Ohio in this case, in effect, held that the municipality by ordinance could grant the power to the street railway company to extend its road outside the limits of the municipality, but in executing that power it was necessary for the railway company to obtain the consent of the board of county commissioners to use and occupy such county road.

We contend that in 1892, boards of county commissioners under the statutory provisions of Ohio then existing had power to grant the use of county roads for extensions of street railways outside municipalities only, and that there existed no specific statutory authority at that time authorizing boards of county commissioners to grant the use of the highways of the state for what is known as an "Inter-urban Railroad," to be constructed wholly without the limits of municipalities. Not until the year 1894 was such authority given by the General Assembly of the State of Ohio. In May of that year, the following Act which is found in Ohio Laws, Volume

91, page 285, was passed by the General Assembly of the State:

"Section 1. Be it enacted by the General Assembly of the State of Ohio, That companies incorporated under Section 3236 of the Revised Statutes of Ohio for such purposes, may construct, maintain and operate electric street railroads, or street railroads using other than animal power as a motive power for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon the highways in this State outside of municipalities.

Section 2. All such companies shall have power to occupy and use for their tracks, cars and necessary fixtures and appliances, the public highways outside of cities and villages, with the consent of the public authorities in charge of, or controlling such highways, and with the written consent of majority measured by the feet front of the property holders abutting on each of such highways.

Section 3. When necessary to enter upon and use private property in the construction and operation of such roads, such companies shall have the same power of appropriation that railroad companies have.

Section 4. Such companies shall have power to lease, purchase, or make traffic arrangements with any other street railroad company as to so much of its tracks and other property, as may be necessary or desirable to enable them to enter or pass through any city or village upon the same terms and conditions applicable to other street railroads. And any existing street railroad company owning or operating a street railroad, shall receive the cars, freight, packages or passengers of any other road upon the same terms and conditions as they carry for the general public.

Section 5. Such street railroad companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation.

Section 6. Such companies shall be subject to the same regulations now provided for street rail-

roads, in so far as the same are applicable, and shall have all the powers in so far as they are applicable, that other street railroad companies have.

Section 7. This act shall take effect and be in force from and after its passage."

Judge Shauck in *State vs. Traction Co.*, 64 O. S., 272, on page 281, said:

"It is well known that it was in response to a general demand for increased traffic facilities between cities and the regions surrounding them, that the act of May 17, 1894, (91 Ohio Laws, 285), which is now included in Sections 3443-8 to 3443-13 of the Revised Statutes was enacted."

The language of the grant, as to the location of the right of way (Record, page 64) is as follows:

"The right is hereby granted to William A. Lynch and to such railroad company as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along *either side* of the state road running between Canton and Massillon, *between the line of the Canton street railway and the corporate limits of the City of Massillon.*"

"The line of the Canton street railway" referred to, in 1892 was the westerly limits of the City of Canton. (Testimony of Mr. Austin Lynch, record page 96.) The City of Massillon lies west of the City of Canton, the distance from the eastern corporation limits of Massillon to the western corporation limits of Canton is about five and one-half miles. (Record, page 96.) So that the grant was for the use of five and one-half miles of the state road between the western corporation limits of Canton and the eastern corporation limits of Massillon, and was therefore, for the use of a highway *wholly without the limits of municipalities.*

Boards of county commissioners in Ohio can exercise only those powers which are *specifically conferred* on them by law, or *necessarily implied* in order to carry out

the specific power conferred, and the statutes giving this power are strictly construed.

Commissioners vs. Holcomb, 7 Ohio, 232.
Commissioners vs. Mighels, 7 O. S., 109.
State ex rel. Treadwell vs. Commissioners, 11 O. S., 183.
Commissioners vs. Railway Co., 45 O. S., 401.

Where then in the laws of Ohio existed in 1892, either specific or implied power for the board of county commissioners of Stark County to make the grant in question? Yet plaintiffs in error contend that this board gave them a perpetual grant. We think, the most that can be claimed is that the board of county commissioners having general control of the highways of the state outside of municipalities conferred a mere license to the predecessor of The Northern Ohio Traction & Light Company.

If the claim of plaintiffs in error is correct, the grant in question is both perpetual and *exclusive*. The right was given for the construction of the street railway with its necessary poles, wires, switches and sidetracks on either side of said road which amounts as a matter of fact, to an *exclusive grant*, of the use of this road for street railway purposes. That is, no other street railway could be constructed upon this highway because of the occupation of the highway by the railway in question. Mr. Justice Lurton in *Owensboro vs. Cumberland Telephone Company*, 230 U. S., 58, one of the cases relied upon by plaintiffs in error, referring to the grant there under discussion on page 69 says,

> "The grant in this case was not exclusive and we are not called upon to deal with that question, since the ordinance here involved expressly reserves the right to make similar grants to other companies."

Immediately preceding this language he quotes from *Dillon on Municipal Corporations,* Sections 1215, 1218 and 1234, to the effect that *express power* to grant an exclusive street franchise has generally been held essential to the grant.

In *Davis vs. New York,* 14 N. Y., 506, it appears that the city corporation by its charter possessed only general power to open, alter, repair and regulate the streets. With these powers only, and *without express authority* from the legislature the city undertook, by resolution to grant the exclusive right to construct a railway in a street. The court held the resolution *void.*

In this connection we also cite *State vs. Gas Light and Coke Company,* 18 O. S., 262, wherein it was held that an exclusive grant of the use of the streets of Cincinnati to a gas company could not be made even when the city had the power to permit the use of the streets for such purposes, because of the lack of *express legislative authority* in the municipality to make such exclusive grant. On page 294, the court says:

> "When a franchise so far in restraint of trade, so pregnant with public mischief and private hardship is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be *free from doubt.* It must be found *on the statute book, in express terms,* or arise from the terms of the statute by implication so *direct and necessary* as to render it equally clear."

In *Birmingham & Pratt-Mines St. Ry. Co. vs. Birmingham St. R. Co.,* 79 Ala., 465, the court discussing the authority to make grants, says:

> "Neither the charter of the City of Birmingham, nor the general statute confers on that corporation the power to grant by ordinance in the nature of a

> contract the *exclusive franchise in perpetuity* of running a street railway through designated streets and avenues of the city; and if such power were granted by its charter or by any public statute, it would be violative of the constitutional provision (Article 1, Section 23), against the passage of laws making an irrevocable grant of special privileges."

We contend, therefore, that the General Assembly of Ohio did not authorize the board of commissioners to make the grant in question if the grant according to its terms is construed as plaintiff in error would have it construed.

(c) The board of county commissioners did not make a perpetual grant.

Let us look to the language of the grant:

> "The right is hereby granted to William A. Lynch and to such railway company as he may cause to be incorporated for that purpose, to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, etc."

The grant is absolutely silent as to time of duration.

Nowhere in this grant are there words of perpetuity such as "successors," "assigns," "forever," or "for all time." This, we think, is very significant in determining the intent of the parties entering into this contract. Nowhere in the record is there any evidence indicating that the board of commissioners of Stark County or any of its members ever looked upon this grant as perpetual. In fact, under the constitution of Ohio and the law we do not see how anyone could have so regarded it. The electric line in question was one of the first, if not the first interurban electric line promoted in this country. Such projects at that time were merely experiments. It was not known to either William A. Lynch or the board of county commissioners whether the proposition would be a success or a failure. Under these circumstances can it be conceived that William A. Lynch meant to bind himself and to pledge his estate to continue the operation of a railroad for all time, even though it developed that the road in question were a losing proposition? And can it be conceived that the commissioners had in mind at that time the compelling of Mr. Lynch to operate the road in question for all time?

Does it not seem reasonable that if William A. Lynch desired a perpetual grant and understood that he was receiving a perpetual grant, he would have had included in this grant some words or expressions of succession or perpetuity?

(1) Rules of Law Governing Construction.

It is a well settled rule of construction that grants of rights such as the one in question are to be strictly construed against the grantee and in favor of the public.

Railway Company vs. Defiance, 52 O. S., 262.

"Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agents of the municipality over them, or of the legitimate exercise of their powers in the public interest will be construed strictly against the grantee and liberally in favor of the public *and never extended beyond its express terms*, when not indispensable to give effect to the grant."

This case was affirmed by the Supreme Court of the United States.

Wabash Railroad vs. Defiance, 167 U. S., 88.

In *The East Ohio Gas Co. vs. The City of Akron*, 81 O. S., 33, appears the following:

Syllabus 3.

"While much regard will be given to the *clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the Courts will exercise great caution not to include in the contract by construction, something which was intended to be excluded.*"

In *Fertilizing Company vs. Hyde Park*, 97 U. S., 659, on page 666, Mr. Justice Swayne expressed the rule as follows:

"The rule of construction in this class of cases is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by implication equally clear. The affirmative must be shown. *Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.* It is axiomatic in the jurisprudence of this Court."

Blair vs. Chicago, 201 U. S., 400.

"One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. Legislative grants of franchises, which are in any way ambiguous as to whether granted for a longer or shorter period, are to be construed strictly against the grantee."

And Mr. Justice Day continues in this case, on page 485:

"We cannot agree that the duration of these permits would be in perpetuity, because of the fact that no time was specifically named in them."

(2) Ohio Grants Silent as to Time Are Held Not To Be Perpetual.

Cases holding grants, silent as to time, to be perpetual, can of course be cited. Holdings in the various states are at variance. When these cases come into the Supreme Court of the United States, this Court will construe the grants in accordance with the constitutions, the statutes and the holdings of the highest courts of the states from which the cases come.

The holdings of the highest court of the state of Ohio are to the effect that grants such as the one in question are not perpetual.

The East Ohio Gas Company vs. The City of Akron, 81 O. S., 33.

The *Akron* case is reaffirmed in the decision of this case, *State ex rel. vs. Northern Ohio Traction & Light Company,* 93 O. S., 466.

Plaintiffs in error quote extensively from *State vs. The Columbus Railway Company,* 1 C. C. (N. S.), 145, affirmed in 73 O. S., 363. The Supreme Court of Ohio *did not approve the doctrine of the lower court in re-*

spect to the perpetuity of the franchise. The Supreme Court said that the judgment was "affirmed on the sole ground that defendant had *present right* to occupy the streets at the time of the commencement of this action. The other questions presented are not decided." (73 O. S., 363.)

Plaintiffs in error quote one other Ohio case in their brief, *Junction Railroad Company vs. Ruggles*, 7 O. S., 1. This was a case involving the grant of an easement by a *private* property owner to a railroad company, and has no bearing upon the question of the duration of a street railroad grant upon a public highway, which grant itself is derived from the state for the use of the public property of the state. The court in that case treated the conveyance as an "executed legal conveyance" from the owner to the Railroad Company of the use of the necessary land for the right of way of the railroad company. The conveyance was not executed in accordance with the formalities required by law and the court "regarding that as done which ought to be done" and for the purposes of the suit treated it as if it were formally executed. Clearly there is a distinction between a conveyance of a right of way from a *private* property owner to a *railroad* which runs across country, and the grant of a *board* of county commissioners to a street railroad company.

In *Rodefer vs. Railroad Company*, 72 O. S., 272, it is held that a permit to lay tracks, silent as to the length of time they were to remain, is a mere license revocable at the option of the grantee.

In *Ampt vs. City of Cincinnati*, 6 Nisi Prius, 401, affirmed 21 C. C., 300, it is held that a municipality has not the power to make an irrevocable grant of the use of its streets, and that a grant without limitation in time is void.

UNDER OHIO LAWS THERE IS WANT OF MUTUALITY IF GRANT IS HELD TO BE PERPETUAL.

Plaintiff in error may remove its tracks, poles and wires entirely from the highway in question under the laws of Ohio.

Section 9115, General Code of Ohio:

> "When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to extend its power plant, such corporation may appropriate so much private property as is necessary for the extension of such power plant, or the construction, operation, and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the manner and subject to the provisions of law for the appropriation of private property by corporations."

Section 9116, General Code of Ohio:

> "For the purposes above provided such corporation may change the location of any part of its railway, and for the purpose of making such change, it shall have all the rights, powers and privileges to enter upon private land and make surveys necessary to effect such change as fully as railroad companies are by law permitted to do."

But it may be said that these sections only refer to street railways in cities. Hence, we quote Section 9122:

> "Such companies (referring to interurban railroad companies), shall be subject to the regulations provided for street railways and have all the powers, in so far as they are applicable, that other street railway companies possess."

Section 9119 provides as follows:

> "Street, interurban or suburban railroads using other than steam as motive power, when necessary may enter upon and use private property in the construction, alteration and operation of its road or any part thereof and for such purposes shall have all of the rights and powers of appropriation outside of municipalities, that steam railroad companies possess."

So that plaintiff in error may at this time or any future time, whenever a majority of its directors deem the same necessary, move entirely from the highway in question.

It even appears in the record in the testimony of Mr. Charles Currie, the general manager of The Northern Ohio Traction & Light Company (Record, page 103), that this company recognizes the right it has to leave the highway in question in that he testifies that the company has surveyed a private right of way between the cities of Canton and Massillon.

THE USE OF THE HIGHWAY IN QUESTION NOT NECESSARY FOR THE DISCHARGE OF THE CORPORATE FUNCTIONS OF THE NORTHERN OHIO TRACTION AND LIGHT COMPANY.

The Northern Ohio Traction & Light Company at the time this action was begun was operating and its charter gave it authority among other things to operate an interurban electric street railroad from Cleveland in Cuyahoga County, Ohio, through the cities of Akron, Canton, Massillon, and New Philadelphia to Uhrichsville in Tuscarawas County, Ohio. It clearly could perform its corporate functions without the use of the highway in question. It can rebuild upon a private right of way. It has the power of eminent domain. If it reaches the

cities named, by any route, it has performed its corporate functions. There is no law in Ohio by which it is compelled to reach these cities by any certain route. As hereinbefore stated its board of directors may change the route any time they decide to do so. Its duties as a common carrier can be performed without the use of the highway in question. Through interurban service can be given without the use of this highway.

THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF STARK COUNTY, OHIO, OF FEBRUARY 19, 1913.

Plaintiffs in error argue that the resolution of the board of county commissioners of Stark County of February 19, 1913 (which resolution is found Record, pages 26, 27, 28 and 29), is a taking from them of something that had theretofore been granted them. That argument assumes that the railroad company had theretofore been given a perpetual grant. If it, by the original grant of 1892, was not given a perpetual grant, then nothing was taken away by the resolution under discussion. The Supreme Court of Ohio said the grant was not perpetual, that it was indeterminate, that it continues only so long as the parties mutually agree. So that what the board of commissioners did by this resolution was in effect to say to the railway company, "we will not extend your term longer." We admit that if the board of commissioners had given William A. Lynch a lawful grant for a term of thirty years, the present commissioners could not shorten that term or recall the portion of the term not yet expired. But if it is an indeterminate grant then nothing is taken away from the plaintiffs in error by the resolution of February 19, 1913.

Then, too, The Northern Ohio Traction Company and The Cleveland Trust Company are presumed to know the nature and extent of this grant. They cannot enlarge the grant merely because a mortgage has been executed.

ESTOPPEL.

Plaintiffs in error assert that the board of commissioners are estopped to deny the perpetuity of the grant. The commissioners at no time assumed this grant to be perpetual.

It is a well established rule in Ohio that those who deal with public bodies must take notice of the limitations upon the powers of these bodies.

Village of Carthage vs. Diekmeier, 79 O. S., 323.
Bridge Co. vs. Campbell, 60 O. S., 406.
McCloud vs. Columbus, 54 O. S., 439.
Lancaster vs. Miller, 58 O. S., 558.

There can be no franchise by estoppel.

Cincinnati Gas Light & Coke Co. vs. Avondale, 43 O. S., 257.
Louisville Trust Co. vs. City of Cincinnati, 76 Fed., 296.

Mr. Justice Holmes in *Calder vs. Michigan*, 218 U. S., 591, page 599, says:

> "By making a contract or incurring a debt the defendants, so far as they are concerned could not get rid of an infirmity inherent in the corporation. They contracted subject not paramount to the proviso for repeal."

RES JUDICATA.

It is claimed by plaintiffs in error that a decision on a demurrer by the Court of Appeals of Stark County is a bar to this action. (*State ex rel. Krichbaum, Prosecuting Attorney of Stark County, vs. The Northern Ohio Traction & Light Company*, 15 O. C. C. [N. S.] 577.)

Neither the opinion of the Supreme Court of Ohio, or the opinion of the judges dissenting makes any reference to this contention of plaintiff in error.

We take issue with counsel for plaintiffs in error upon their statement that the causes of action in that case and this are the same. The resolution of the Board of County Commissioners, March 27, 1912 (Record, page 53), the one plead in the case filed in the Court of Appeals, is materially different from the resolution of said board of February 19, 1913 (Record, page 26), the one plead in this case. That case was decided upon a demurrer to the petition. Plaintiffs in error in their briefs quote extensively from the opinion of the court in that case, but they do not quote what the court says on page 587, wherein the court holds that the commissioners' resolution of March 27, 1912, is not an unconditional declaration of the forfeiture of the grant by the commissioners, and that therefore the petition did not state a cause of action, and for that reason the demurrer to the petition was sustained. The resolution of February 19, 1913, plead in this case is an unconditional declaration on the part of the board of county commissioners of the termination of the grant.

Moore vs. Dunn, 41 O. S., 62, is directly in point. In that case the defendant set up as a defense the judgment given him when a demurrer in a prior action was sustained. The prior action was between the same parties and concerned the same subject matter as the case under consideration. The Supreme Court of Ohio held

that the judgment in the first case was not a bar to the cause of action in the second case. On page 63, Judge McCauley said:

> "The single question in this case is, whether or not a judgment for the defendant upon a petition which did not state facts sufficient to constitute a cause of action, is a bar to a future action between the same parties for the same case.
>
> A judgment for the defendant given upon the facts stated in the petition is conclusive upon the plaintiff only as to the facts therein stated. If the facts alleged make a cause of action a judgment upon them is final between the parties. If the facts do not state a cause of action a judgment upon them is not a judgment on the merits of the case, and does not stand in the way of a future action for the same cause."

THIS GRANT NOT PERPETUAL BECAUSE THE GRANT COULD NOT HAVE BEEN MADE FOR MORE THAN TWENTY-FIVE YEARS.

If the county commissioners of Stark County in 1892 had authority to make any grant, their authority was limited to the making of a grant for 25 years in duration. In the year 1892, Section 2502, of the Revised Statutes of Ohio, in terms limited street railway grants within municipalities in the State of Ohio to 25 years. This limitation of 25 years was the law in Ohio for many years prior to 1892, and is and has been the law ever since said time and was the law in 1880.

In 1880, Section 3439 specifically provided that the provisions of Section 2502 containing the 25 year limitation applied to grants made by County Commissioners.

On April 18, 1883 (80 Ohio Laws, page 173), Sections 3438 and 3439, Revised Statutes of Ohio, were amended so that the provision of Section 2502 as to the 25 year

limitation should not apply to grants by county commissioners. This amendment was in our judgment clearly unconstitutional for the reason that it excepted a county.

Railway Company vs. Railway Company, 5 Ohio Circuit Court (N. S.), 583, affirmed 73 O. S., 364.

Hence the provisions of the law applying in the year 1880 which were the same in 1892 when the grant in question was made, must have limited the right of the commissioners to make a grant to 25 years in duration. The amendment of 1883 being unconstitutional because a county was excepted, it follows that the provisions existing in 1880 apply, for it is held in Ohio that an amendment being unconstitutional, the repealing clause of the Act of April 18, 1883, falls with it. (*State vs. Buckley* 60 O. S., 273.)

THE DECISION OF THE SUPREME COURT OF OHIO IN THIS CASE.

The Supreme Court of Ohio granted the relief prayed for by defendant in error (93 O. S., 466).

The majority of the court rendered judgment for the relator on authority of *The East Ohio Gas Company vs. The City of Akron,* 81 O. S., 33.

Plaintiffs in error here seek to distinguish between the present case and the case of *Gas Company vs. Akron,* 81 O. S., 33, although the majority of the judges of the Supreme Court of Ohio who decided the present case, made no such distinction. Counsel overlook the fact that under the Statutes of Ohio two distinct things are provided for with respect to gas companies, namely, authority is given municipalities to grant a gas company the right to occupy the streets with its mains, and that the right is given municipalities to make ten year contracts

with gas companies as to the price of gas. An examination of that case will not sustain the claim of defendants in error as to the distinction.

The court in *The East Ohio Gas Company* case, in discussing the ordinance there under consideration on page 52, says:

> "The language of the ordinance is, 'that the East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the City of Akron, Ohio, * * * to maintain, operate, repair and remove mains and pipes * * * together with the right to construct and maintain, repair and remove all necessary regulators, etc.' Did the granting of this privilege, or right, and its acceptance, constitute an agreement by The Gas Company that, having entered the city, it should remain there forever, if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But if the Company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the Gas Company has a perpetual franchise in the streets? We are not now prepared to hold that the Company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error on more mature reflection, would not insist upon this conclusion."

The Supreme Court of Ohio clearly held in the *Akron-Gas Company* case, syllabus 4, that

> "Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto."

CONCLUSION.

We submit therefore that the grant in question is not a perpetual grant, because the constitution of the State of Ohio forbids such grants,— does not authorize the Legislature itself to make such grants, and that the Legislature in turn could not and clearly did not authorize the Board of Commissioners of Stark County to make a grant perpetual in duration. That the Commissioners of Stark County, Ohio, did not have authority in the year 1892 to grant the use of the highway in question for an interurban railroad such as the railroad in question, because such power was not specifically conferred upon them. And that the intention of the parties, as shown by the language of the grant itself and the circumstances surrounding the making of the grant, was not to bind each other to a perpetual grant.

Respectfully submitted,

FRANK N. SWEITZER,
Prosecuting Attorney of Stark County, Ohio, and

HUBERT C. PONTIUS,
Solicitors for Defendant in Error.

NORTHERN OHIO TRACTION & LIGHT COMPANY ET AL. *v.* STATE OF OHIO ON THE RELATION OF PONTIUS, PROSECUTING ATTORNEY OF STARK COUNTY, OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 60. Argued October 18, 19, 1917.—Decided January 28, 1918.

Where there are no controlling provisions in state constitution or statutes and no prior adjudication by its courts to the contrary, a franchise for an interurban electric railway, granted by the proper state

authority without limit as to duration, and in the absence of circumstances showing an intention to give or accept a mere revocable right, is a contract not subject to annulment at the will of the granting authority.

Under the constitution and statutes of Ohio in 1892, county commissioners had power to grant franchises over public roads valid for twenty-five years, if not perpetually.

A resolution of county commissioners purporting to revoke an electric railway franchise, and treated by the state court as having that effect, amounts to state action, and, the franchise not being so revocable, such resolution impairs its obligation and is void.

Upon review of a judgment erroneously treating a franchise as revocable at the will of a board of county commissioners and upholding the board's resolution purporting to revoke it, the court is not called upon to determine whether the franchise term has since expired by limitation, or whether the state legislature (which has not acted) may have reserved power to revoke or repeal the franchise.

93 Ohio St. 466, reversed.

THE case is stated in the opinion.

Mr. John C. Welty and *Mr. Joseph S. Clark*, with whom *Mr. John C. Weadock* was on the briefs, for Northern Ohio Traction & Light Co.

Mr. W. T. Holliday filed a brief for Cleveland Trust Co., plaintiff in error.

Mr. Frank N. Sweitzer and *Mr. Hubert C. Pontius* for defendant in error.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Northern Ohio Traction & Light Company through successive assignments from William A. Lynch acquired the interurban electric railroad between Canton and Massillon, Ohio, October, 1906; The Cleveland Trust Company is trustee under a mortgage on the road intended to

secure an issue of bonds. The line was constructed under resolution by the Board of County Commissioners, Stark County, passed February 22, 1892, which granted to William A. Lynch, and such railroad corporation as he might cause to be incorporated for that purpose, the right to locate, construct, maintain and operate an electric railroad along the state highway without specifying any limit of time. This resolution is copied in the margin.[1]

[1] *Resolution for Right of Way for Electric Railway.*

Resolved, that the right is hereby granted to William A. Lynch and to such railroad corporation as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails in the customary manner with the necessary poles and wires for an electric railroad. The ties shall not be laid nearer to the center line of said road than nine feet, except where switches are constructed, at which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the traveled portion of said road, or nearer than nine feet from the center of the road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and its bed shall be re-graveled so as to restore it to its present state of usefulness, instead of locating said railroad on one side of the center line as above provided, the same may be located, along the center line of said road, along the whole or any portion thereof provided that in such case wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feet wide on fills, and each roadway shall be graveled to a width of ten feet and eight inches in thickness and put in condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossings shall be constructed of plank or other suitable materials, at all public highway crossings or intersections and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in

A disagreement concerning rates having arisen, by resolution of March 27, 1912, the Commissioners declared the original grant to Lynch not a perpetual franchise but subject to termination by either party and that the passenger rate was excessive and should be reduced. It continued, "therefore, be it resolved, that unless said Northern Ohio Traction and Light Company comply with the above mentioned matters of reduction of amount of fare charged for transporting people between the cities of Canton and Massillon and from intermediate points, together with the transfer on the city lines of Canton and Massillon, on or before the twenty-seventh day of April, 1912, the said grant given to said William A. Lynch on February 22, 1892, to operate an electric railroad between the said cities of Canton and Massillon, is hereby declared terminated and the prosecuting attorney of this county is hereby instructed to take such legal proceedings as may be necessary to have said grant made null and void

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the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially, or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor changes in location and the plans and methods of grading the highway as the public interests may require. It being understood and agreed that said Wm. A. Lynch or the railroad company, before commencing any part of said work shall enter into a bond in the sum of ten thousand dollars for the faithful performance of the conditions enjoined upon them by this resolution. This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5,000) five thousand dollars conditional that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said road.

and the said electric railway removed from said public highway between the said cities of Canton and Massillon."

April 26, 1912, the Commissioners returning to the matter resolved:

"In the event that said demands are not met by said company on or before the time mentioned in the said resolution of March 27th, 1912, the prosecuting attorney of this county be and he is hereby instructed to immediately proceed to have injunction proceedings filed against said Northern Ohio Traction & Light Company, restraining said company from operating said electric railway on the public highway between the cities of Canton and Massillon or running cars thereon and to further compel said Northern Ohio Traction & Light Company to remove said railway from said public highway, and be it further resolved, that this resolution be contingent upon and in accordance with the conditions of the said resolution passed by this board on March 27th, 1912, . . ."

Accordingly, August 13, 1912, Charles Krichbaum, Prosecuting Attorney, instituted *quo warranto* proceedings in the Circuit Court asking that plaintiff in error Traction & Light Company be ousted from exercising the franchise to operate a railroad along the Canton-Massillon highway, and be compelled to remove its tracks and switches. A demurrer was sustained because (1) the petition did not state facts sufficient to constitute a cause of action; (2) it did not state facts sufficient to justify relief prayed; (5) plaintiff had no legal power to try or bring the action. No appeal was taken from a final judgment entered June 3, 1913.

February 19, 1913, the Commissioners adopted another resolution which, after referring to the one of 1892 and the construction and operation of the railroad, stated that the grant continued from day to day so long as both parties consented and could be terminated at will, and then

declared "that said term of said grant and conveyance be terminated on this date." It is in the margin.[1]

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[1] Resolution of the County Commissioners of Stark County, Ohio.

Whereas, the county commissioners of Stark County, Ohio, on the 22nd day of February, 1892, passed a resolution appearing on pages 17, 18, and 19 of Volume 8, Commissioners' Journal, Stark county, Ohio, and said resolution is as follows: [Here follows a copy of the resolution granting a right of way to Lynch above set out] and,

Whereas, an electric interurban railway, some time after the passage of said resolution, was built and constructed from Canton, Ohio, to Massillon, Ohio, upon the state road between said cities, the course described in the aforesaid resolution, and

Whereas, cars are now being operated upon said interurban electric railway and have been so operated for some years, by persons or companies, claiming to derive their rights and title from the said William A. Lynch, and claiming that their said title, right and interest emanate from the aforesaid resolution, and

Whereas, The Northern Ohio Traction and Light Company, a corporation, is now and has been, for several years last past, operating the interurban electric cars over said railway and carrying passengers over said interurban electric railway between the cities of Canton and Massillon, Ohio, and

Whereas, the said The Northern Ohio Traction and Light Company claims its rights, interests and privileges for the conducting of said business as assignee, transferee and successors of the said William A. Lynch, and his assigns or successors, based and founded upon the aforesaid resolution passed by the county commissioners of Stark county, Ohio, on the 22nd day of February, 1892, and recorded on pages 17, 18 and 19 of Volume 8, Commissioners' Journal, Stark county, Ohio, and

Whereas, the commissioners of the county of Stark and state of Ohio contend,

First. That the said William A. Lynch, at the time of the enactment of said resolution of the commissioners of Stark county, was not an incorporated company and was not entitled to the privileges of which a company incorporated in Ohio for the purpose of owning and operating an interurban electric line, was not such an entity that he could accept the interests, rights and titles granted by the county commissioners of Stark county in the aforesaid resolution.

Second. That whatever right, title, interest and privilege, if any, were conveyed by the aforesaid resolution to the said William A. Lynch

Obeying this last resolution, Hubert C. Pontius, Prosecuting Attorney, instituted the proceeding under review in the Supreme Court of Ohio. The petition alleged control of the railway by the Traction & Light Company; set up resolutions of 1892 and 1913 authorizing its construction and directing removal; and declared the company continued operations "which said conduct plaintiff avers is without warrant or authority of law." It concluded, "wherefore, because of the premises and matters herein

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were conveyed and granted to the said William A. Lynch and to him alone, said grant and conveyance being a personal one.

Third. That the term of the grant included in the aforesaid resolution of the county commissioners, passed by the county commissioners on the 22nd day of February, 1892, as aforesaid is an indeterminate one, continuing from day to day and that said term extends and continues only so long as both parties to said grant and conveyance, to wit: Stark county, Ohio, through its board of county commissioners, the grantor, and William A. Lynch, or any company he might organize and incorporate, or any successor of the said William A. Lynch or the said company he might organize, the grantee, agree and consent, and that said grant and conveyance can be terminated at any time by either party to said grant and conveyance, or those claiming to hold or holding under said grant.

Now, therefore, be it resolved by the board of commissioners of Stark county, Ohio, assembled in session, that said term of said grant and conveyance be terminated on this date, to take effect on this date, and that the board of commissioners of Stark county, Ohio, refuse to extend to The Northern Ohio Traction and Light Company, which company claims to hold, title, right and interest as the successor, assignee and transferee of the aforesaid William A. Lynch and his successors and assignees, or either of them, the term for the operation of the aforesaid interurban electric railroad beyond this date.

Be it resolved that The Northern Ohio Traction and Light Company be notified that the commissioners of Stark county, Ohio, have on this date terminated the term of said grant and conveyance, under which said grant The Northern Ohio Traction and Light Company claim the right and privilege of operating said interurban electric railroad between Canton and Massillon, Ohio, and that the county of Stark and state of Ohio and the board of commissioners of Stark county, Ohio, will regard and do regard the operation of an interurban electric rail-

set forth, the plaintiff prays the advice of the court, and that the defendant, to wit, The Northern Ohio Traction and Light Company, be compelled to answer by what warrant it claims to have the use and to enjoy the rights, privileges and franchises aforesaid, in the operation of its said interurban electric railroad between the cities of Canton and Massillon, Ohio, in said county and state; and that it be ousted from exercising the same and be compelled to remove its tracks and switches from the said Canton-Massillon road between the corporate limits of the said cities of Canton and Massillon, and plaintiff further prays that such other and further relief be granted in the premises as to the court may seem just and proper."

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road between Canton and Massillon, Ohio, on said state road running between Canton and Massillon, Ohio, from this date forward a usurpation and infringement upon the rights of said Stark county, Ohio, and said board of commissioners of said Stark county, Ohio.

Be it resolved that the prosecuting attorney of Stark county, Ohio, be directed and is hereby directed to take whatever steps he may deem necessary and advisable to prohibit and prevent The Northern Ohio Traction and Light Company or any other person, individual, corporation or company from continuing to operate an interurban electric railroad between the cities of Massillon and Canton, Ohio, on the state road, running between said cities by virtue of any rights, title or interest the said The Northern Ohio Traction and Light Company or any other person, individual, corporation or company may claim as resulting from the aforesaid resolution, enacted by the county commissioners of Stark county, Ohio, on February 22, 1892.

Be it resolved that the said The Northern Ohio Traction and Light Company be directed and is hereby directed to remove all its property, equipment and belongings from the right of way described by the aforesaid resolution, herein referred to as having been passed by the county commissioners of Stark county, Ohio, on February 22, 1892, and now occupied by the said The Northern Ohio Traction and Light Company, at once.

Be it resolved that a copy of this resolution be sent or delivered, and the auditor of Stark county, Ohio, is hereby directed to send or deliver to The Northern Ohio Traction and Light Company a copy of this resolution.

The answer relied upon final judgment in proceedings instituted by Krichbaum as an adjudication of the grant's validity; also a resolution by the county commissioners May 3, 1909, providing for double tracking as recognition and continuation of original franchise. And further, "this defendant says that said resolution of February 22, 1892, and said amending resolution of May 3, 1909, by the acceptance thereof by this defendant and its predecessors in title, constitute a contract between the board of county commissioners of Stark county, Ohio, and this defendant, and that any ouster of this defendant from its use and operation of said electric railroad between Canton and Massillon would be an impairment of the obligation of this defendant's contract, and a taking of this defendant's property without due process of law, and would also be a denial to this defendant of the equal protection of the law, all in violation of the Constitutions of Ohio and of the United States."

Without opinion or other explanation the Supreme Court pronounced the following decree October 19, 1915: "This cause came on to be heard on the pleadings and the evidence and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of *Gas Company* v. *The City of Akron*, 81 Ohio St. 33. It is, therefore, ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges and franchise described in the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches from the said Canton and Massillon road between the corporate limits of the said Cities of Canton and Massillon within ninety days from this date. It is further ordered and adjudged that the plaintiff recover of the defendant its costs herein, taxed at $———."

Dissenting, three members declared: "The sole ques-

tion in this case as presented is whether the board of county commissioners can revoke and annul a franchise granted by the state without having the power so to do delegated to it by the sovereign authority." 93 Ohio St. 466.

Plaintiffs in error maintain that the Commissioners' resolution dated February 19, 1913, was an exercise of state authority repugnant to the Federal Constitution, because it impaired their contract, took their property without due process of law, and denied them equal protection of the laws.

In *East Ohio Gas Co.* v. *Akron*, (decided October, 1909) 81 Ohio St. 33, relied upon to support the judgment below, a city ordinance, without specifying anything as to duration, provided "that the East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the city of Akron, Ohio, . . . to maintain, operate, repair and remove mains and pipes . . . together with the right to construct and maintain, repair and remove all necessary regulators," etc. And the court said (pp. 52, 53): "It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; . . . It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

The Supreme Court determined, in effect, that a valid franchise to construct and maintain the railroad granted to Lynch and his successors in 1892 was terminated by resolution of 1913. Accepting this ruling, is the latter resolution inoperative and void because in conflict with

Art. I, § 10, of the Federal Constitution? Manifestly it amounted to action by the State. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Ross* v. *Oregon*, 227 U. S. 150, 163.

It is suggested that in 1892 Ohio statutes only empowered county commissioners to grant franchises not exceeding twenty-five years in duration, and the present one accordingly expired in February, 1917. But by its final judgment (1915) the Supreme Court recognized a valid franchise existing in 1913 and declared it ended by the resolution of that year without discussing the subject of limitation. Consideration of the point is therefore unnecessary—our concern is with rights struck by the resolution. We express no opinion as to whether those have now expired. Neither are we concerned with the General Assembly's reserved power to revoke or repeal privileges; it has taken no action. Ohio Constitution (1851), Art. I, § 2, and Art. XIII, § 2.

Beyond serious doubt, under constitution and statutes of Ohio in 1892 county commissioners had power to grant franchises over public roads valid for twenty-five years, if not perpetually. Nothing said by the state courts prior to *East Ohio Gas Co.* v. *Akron* (1909) is cited which intimates that grants, without specified limit of time, were revocable at will. Evidently this was not the settled view in 1903 when the Circuit Court distinctly adjudged that accepted ordinances by a city between 1861 and 1873, authorizing construction and operation of street railways, silent as to time, created perpetual rights, subject however to revocation by the General Assembly. *State ex rel. Taylor* v. *Columbus Ry. Co.* (1903), 1 Ohio C. C. (N. S.), 145. This judgment was affirmed in 1905, 73 Ohio St. 363, "on the sole ground that the defendant had present right to occupy the streets at the time of the commencement of this action"—a result hardly intelligible upon the theory that the grants were revocable at will. Appar-

ently the doctrine announced in *East Ohio Gas Co.* v. *Akron*, was not suggested in either court.

The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 384.

Where there are no controlling provisions in state constitution or statutes and no prior adjudication by its courts to the contrary, we have distinctly held that franchises like the one under consideration are contracts not subject to annulment as here undertaken. *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 664; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 556; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 73; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 117.

As construed by the Supreme Court of Ohio the resolution of 1913 impaired a valid contract, upon which plaintiffs in error properly relied. It was accordingly invalid and without effect.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DAY took no part in the consideration or decision of this cause.

MR. JUSTICE CLARKE, dissenting.

The parties to this suit are a Board of Commissioners of an Ohio county and two corporations organized under the law of the same State, and the jurisdiction of this court, if it exists at all, must be found in the claim that the resolution of the County Commissioners of February 19, 1913, is a law of the State of Ohio which impairs the ob-

ligation of the grant by the Commissioners of February 22, 1892, within the meaning of the Constitution of the United States. This resolution, printed in the margin of the court's opinion, declares that the Commissioners "contend" that the term of the grant of February 22, 1892, "is an indeterminate one, continuing from day to day, and that said term extends and continues only so long as both parties to said grant . . . agree and consent" and that it may be terminated at any time by either party to it. The resolution then declares the grant terminated as of the date of the resolution and that the prosecuting attorney of the county be, and he is, directed to take such steps as he may deem necessary to prevent further operation of the railroad on the highway, as provided for by the grant.

The effect of the decision by the Supreme Court of Ohio is that this "contention" of the County Commissioners that the grant is one determinable at the will of either party to it, is sound and that the Commissioners having elected to terminate it the rights of the railway company were at an end. This court reverses this decision of the state Supreme Court and holds that the grant of 1892 was not revocable at will by the County Commissioners, that the resolution of February 19, 1913, in terms revoking it, is invalid and void, and without deciding whether the power of the Commissioners was limited to the granting of such a franchise for twenty-five years and if so whether the grant has expired the court returns the case to the state courts for further proceedings not inconsistent with its opinion.

It is impossible for me to concur in the conclusion thus arrived at by the court and my reasons for dissenting will be briefly stated.

The resolution of February 19, 1913, is in terms simply an expression of the "contention" of the County Commissioners as to the legal effect of the grant of 1892, coupled

with notice of their election to terminate the same agreeably to their interpretation of it and with direction and authority given to the prosecuting attorney of the county to test in the courts the validity of the position asserted by the Board.

That such a resolution to apply to the courts of the country to establish an asserted legal right is not a law impairing the obligation of a contract is expressly decided, it seems to me, in *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, and in principle in *Defiance Water Co.* v. *Defiance*, 191 U. S. 184. A resolution such as was passed here is the only form in which the Board of County Commissioners could assert, in advance of litigation, its contention as to its rights under the contract, and it is not different in effect from what it would have been if the same contention had been expressed in another form, such as by way of an answer filed in behalf of the Commissioners in a suit brought by the Companies to enforce what they considered to be their rights under the grant. The decision of this court that the obligation of the contract was thus impaired amounts to holding "that whenever it is asserted on the one hand that a municipality [county] is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court." This court in the language quoted has declared such a conclusion to be obvious error in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 149.

These three clear and well reasoned cases seem to me to correctly decide that the court is without jurisdiction to consider this case and that it should be dismissed.

But even if we should assume that this court has jurisdiction to decide the case, it, nevertheless, would be impossible for me to concur in the conclusion arrived at.

The resolution of the County Commissioners under discussion does not, in words, define the term for which the franchise to operate a railroad on the public highway is to continue. The Supreme Court of Ohio holds that it results from this failure to define "in express terms," "in plain terms," the duration of the grant that it should be considered an indeterminate one, but this court holds that this failure to clearly define the duration of the grant results in its being a perpetual one, unless it be otherwise limited by constitution or statute.

The rule for the construction of grants such as we have here will nowhere to be found more clearly or imperatively stated than in the decisions of this court.

In *Blair* v. *Chicago*, 201 U. S. 400, 463, a decision obviously rendered upon "great consideration," it is declared that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred "*in plain terms*," "*in express terms*," and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation, "*which can claim nothing which is not clearly given.*" The sound reason given for this rule is that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

The Supreme Court of Ohio is not less definite in adopting the same rule of construction, saying, in *Railroad Company* v. *Defiance*, 52 Ohio St. 262:

"Every grant in derogation of the right of the public in the free and unobstructed use of the streets . . .

will be construed strictly against the grantee, and liberally in favor of the public; *and never extended beyond its express terms* when not indispensable to give effect to the grant."

What results from the application of this rule to the grant we are considering?

The fact that two such courts as this one and the Supreme Court of Ohio differ so widely that the one holds the grant on its face to be perpetual, and the other holds it to be determinable at will, is, to me, convincing evidence that a perpetual grant is not conferred "in plain terms," "in express terms," that it is "something not apparent on the face of the grant," and that, therefore, to give such a construction to the resolution is to find in it a most vital and important provision which "those interested" in obtaining the grant would have been eager to incorporate into it had they thought it possible to obtain consent to it. It is impossible for me to doubt that a proposal to the County Commissioners to make the resolution read "Resolved, that the right is hereby granted . . . to construct, maintain and operate *perpetually* an electric railroad . . . on the State road between Canton and Massillon" would have been summarily rejected by the Commissioners. The public indignation which the making of such a grant would have excited was sufficient protection against its being made "in plain terms" and the rule we have quoted, in my judgment, should be the protection of the public against such a result being accomplished by construction.

The Supreme Court of Ohio may have been influenced in its decision of this case by the fact that from the time when the development of the State became such as to make of public importance the terms of grants of street railway rights in the streets and public roads of that State, the General Assembly of the State limited to twenty-five years the term for which such rights might be granted, either

by county commissioners or by municipal corporations. It is difficult for a man living in such a legal atmosphere with respect to such grants to think in terms of perpetual franchises. (An attempt to remove this restriction from grants by county commissioners was declared unconstitutional by the Supreme Court in *Railway Company* v. *Railway Company*, 5 Ohio C. C. (N. S.) 583, affirmed 73 Ohio St. 364.)

The decision of this case by the Supreme Court of Ohio is without written opinion, but it is rested by the court upon its previous decision in *East Ohio Gas Co.* v. *Akron*, 81 Ohio St. 33. In that case the City of Akron contended that the franchise granted to the Gas Company, in terms unrestricted as to time, was perpetual, and the Gas Company contended that it was determinable at the will of either party. After having the case under advisement for six months, and as the court says in its opinion "on account of its great importance to the public as well as to all public service corporations" having given unusual consideration to the case, the contention of the Gas Company was sustained and the grant was held "simply determinable, existing only as the parties mutually agree thereto." Paragraph three of the syllabus of the case, which in Ohio has the approval of the entire court, reads:

"While much regard will be given to the clear intention of the parties, yet where the *contract is entirely silent* as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded."

This decision was rendered in 1909 by a unanimous court, and six years later it was made authority for the decision of this case. There is no Supreme Court authority in Ohio to the contrary. The judgment by an inferior court, cited in the majority opinion, that street railway grants made before the statutory limit of twenty-five years was imposed and silent as to duration were perpetual, was

promptly discountenanced when the case reached the Supreme Court. 73 Ohio St. 363.

A decision by a state Supreme Court, repeated after the lapse of six years, of a question involving the construction of local laws is, in my judgment, entitled to very great weight.

There was no question raised in the Ohio court but that a contract was created by the passing and accepting of the resolution of 1892, and the record shows that the sole question for decision, and which was decided, was, whether the grant was an indeterminate or a perpetual one. If the grant had contained an express provision that it was revocable at will, it would have been impossible, having any regard to the meaning of words, to have said that the resolution of 1913 impaired its obligation. It would have been simply and only a form of exercising a legal right the exercise of which was contemplated by the contract. The case is not different if the grant, without such expression, really means, as the Supreme Court of Ohio held that it means, the same thing as if such provision had been incorporated into it, and since the state court arrived at its result by the construction of the grant wholly unaffected by the subsequent resolution terminating it, it seems clear enough, upon repeated decisions of this court, that a decision should not be rendered here based on the theory that the grant was impaired by a resolution in form terminating it. While this court has held that in such cases it will for itself determine whether a contract exists and what its terms are, yet where the decision of the state court is so manifestly unaffected by the later "law" as it is in this case, it should be given weight and authority comparable at least to that which would have been given it if it had been directed to the validity of the granting "law" under the state constitution.

The power to declare laws of States unconstitutional and to reverse the judgments of the Supreme Courts of

States is so fateful and is so unprecedented in the history of governments other than ours that, as this court has repeatedly declared, it should be exercised only in cases which are clear, and it is impossible for me to think that this is such a case.

The only reason given by the court in its opinion for differing with the Supreme Court of Ohio in its construction of the granting resolution of 1892 is that "The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners."

There is no evidence whatever in this record that there were any special circumstances "surrounding the grant of 1892," and to undertake to infer what the unexpressed intention of the parties to this grant was twenty-five years ago is, it seems to me, an unusual and unpromising enterprise.

That it would be against common experience to conclude that rational men would wittingly invest their money in a railroad constructed under a grant determinable by the action of county commissioners is reasoning which it seems is more persuasive with courts than with investors or men of affairs. To reason upon what is reasonable is always uncertain and often misleading, but in this case we have ascertained facts to guide us.

Until recent years street railroad franchises (locations), and also electric light, gas, and other public utility franchises were revocable in Massachusetts, by aldermen in cities, and by selectmen in towns (counties), and they are still in the main so revocable, save that as to railroad grants revocation is now subject to approval by the State Railroad Commission, and as to some other "locations" revocation is subject to approval by the Board of Gas and

Electric Light Commissioners. Mass. Rev. Laws, 1902, vol. II, §§ 7, 32, pp. 1044, 1051. *Springfield* v. *Springfield Street Ry. Co.*, 182 Massachusetts, 41, 48; *Boston Electric Light Co.* v. *Boston Terminal Co.*, 184 Massachusetts, 566; *Metropolitan Home Telephone Co.* v. *Emerson*, 202 Massachusetts, 402. Yet hundreds of millions of dollars have been invested in that State in dependence upon these revocable ordinances.

In legislating for the District of Columbia, Congress has followed the Massachusetts example and has made street railroad grants indeterminate and revocable at the will of Congress. 12 Stat. 390, § 6; 27 Stat. 334, § 8.

Wisconsin, in 1907, adopted the principle of indeterminate franchises (Laws of Wisconsin, 1909, § 1797t), and the new constitution of Michigan recognizes it by providing that any franchise not revocable at will shall require the affirmative vote of sixty per cent. of the voters before it can become valid. Constitution, 1908, Art. 8, § 25. Wilcox Municipal Franchises, vol. I, pp. 36, 37, vol. II, pp. 46, 47, and c. 27.

This form of franchise has been called "a tenure during good behavior," it has resulted in superior service to the public and, to the surprise of those who reason *a priori* on the subject, such franchises have proved in effect perpetual. This type of franchise is undergoing modification in various parts of the country, which will, no doubt, improve it, but, of it even as it now is, Wilcox has this to say:

"Unquestionably, with the recognition of the unspeakable wrong that is inherent in the grant of perpetual franchises, and the great practical disadvantages that usually arise in connection with limited-term grants, public sentiment is rapidly crystallizing in favor of the indeterminate franchise as the most promising basis for public control of street railways." Municipal Franchises, vol. II, p. 240.

Perpetual franchises have proved to be such a burden in communities upon which they have been imposed (Wilcox, vol. II, c. 26) that, for the reasons so well stated in *Blair* v. *Chicago*, *supra*, it is impossible for me to agree that any grant is perpetual unless the language used in it is so express and clear that reasonable men cannot differ in giving to it that effect.

Thus for the reasons (1) That a perpetual grant is not "in plain terms" made by the resolution of 1892; (2) That appropriate consideration seems to me not to be given to the decision of the Supreme Court of Ohio, and (3) That the reasons stated for inferring that an irrevocable franchise was intended by the granting power in the case before us are not sound reasons, I should dissent from the opinion of the court even if convinced that it had jurisdiction to decide the case.

MR. JUSTICE BRANDEIS concurs in this dissent.